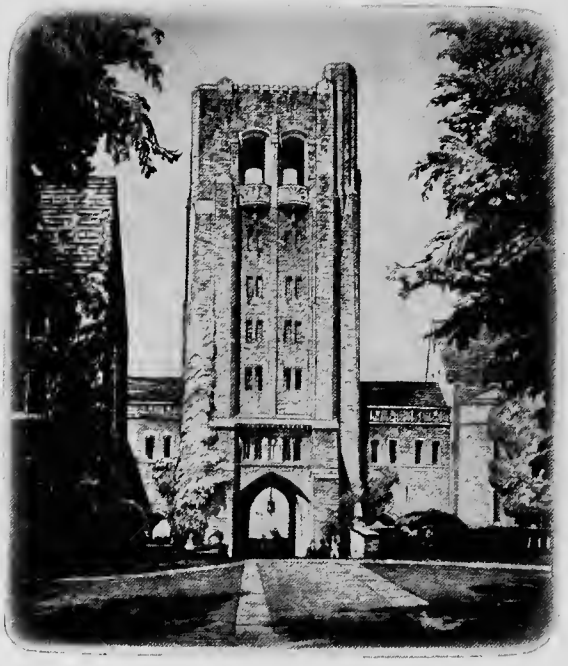
CASES ON CARRIERS.

BEALE.

PART I.



A

SELECTION OF CASES

ON

THE LAW OF CARRIERS.

BY

JOSEPH HENRY BEALE, Jr.,
PROFESSOR OF LAW IN HARVARD UNIVERSITY.

PART I.

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CASES ON THE LAW OF CARRIERS.

HISTORICAL INTRODUCTION.

PRIOR OF BRINKBURN *v.* WILLIAM DE WHELPINGTON.

NORTHUMBERLAND ITER *coram* METINGHAM, J., 1299.

[*Brinkburn Chartulary*, 105.]

WILLELMUS [de Whelpington] summonitus fuit ad respondendum Priori de Brinkeburne de placito quod reddat ei tres cartas, quas ei injuste detinet. Et unde queritur quod cum praedictus Prior tradidisset eidem Willelmo tres cartas . . . apud Brinkeburne custodiendas et eidem Priori liberandas cum ab ipso fuerit requisitus, praedictus Willelmus praedictas tres cartas dicto Priori reddere contradixit, licet saepius super hoc fuerit per ipsum Priorem requisitus, et adhuc reddere contradicit, unde dicit quod deterioratus est et ad dampnum habet ad valentiam viginti marcarum. Et inde producit sectam.

Et W. venit, etc., et bene cognoscit praedictas cartas ei fuisse, sicut praedictus Prior asserit, liberatas eidem Priori liberandas cum illas petierit. Set dicit quod die Sabbati proxima post festum Sancti Johannis Baptistae anno regni Regis praedicti, latrones ignoti ad domum suum apud Whelpington noctanter accesserunt, ac bona et catalla sua simul cum duabus cartis ibidem inventis ceperunt et asportaverunt, et impressionem sigillorum de duabus cartis abstraxerunt, et scripta ibidem reliquerunt, quas hic in Curia profert. Et tertiam cartam integram . . . eidem Priori liberavit.

Et praedictus Prior per Willelmum de Denum, attornatum suum, hoc idem cognoscit, et praedictas duas cartas sic confractas hic in Curia admisit, et bene concedit illas eodem modo quo praedictus W. asserit fuisse per latrones ablatas.

Ideo praedictus Willelmus quietus, etc.

Y. B. 8 Ed. II., 275 [1315]. William le Bonion, Clerk, brings his writ of Detinue of Chattels, against one Maude, and counted that he detained from him wrongfully, etc., the said, etc., that is to say, rings, a silver vessel, and other jewels.

Migham. Sir, we tell you that this same W. bailed us to guard a locked chest without the key, and he carried off the key himself, and

whether other things were stolen, as he says, we do not know; and we tell you that thieves came at night and broke into the chamber of this same Maude, and carried off the chest with the chattels and broke it open, and carried off our goods and chattels with it, ready, etc.

Russell. That he bailed to you the jewels aforesaid outside the chest, and desired you to return them at his will, ready, etc. *Et alii quod non.*[1]

Y. B. 12 & 13 Ed. III. 244 [1339]. Detinue of chattels to the value of 100*l.* against an Abbot by a man and his wife, on a bailment, made by the father of the wife when she was under age, of chattels to be delivered to his daughter, when she was of full age, at her will; and they counted that he delivered pots, linen, cloths, and 20*l.* in a bag sealed up, etc.

Pole. He demands money, which naturally sounds in an action of debt or account; judgment of the count.

Stouford. We did not count of a loan which sounds in debt, nor of a receipt of money for profit, which would give an action of account, but of money delivered in keeping under seal, etc., which could not be changed; and if your house were burnt, that would be an answer.

SCHARDELOWE, J. Answer over.

Pole. We do not detain in manner as he has counted; ready to defend by our law.

Stouford. We have counted of the bailment made by another; wherefore, do you intend this to be your answer?

Y. B. 22 Lib. Assis. pl. 41 [1348]. I. de B. complains by his writ that G. de F. on a certain day and year at B. upon Humber had undertaken to carry his mare taken on his boat over Humber water safe and sound; whereas the said G. overloaded his boat with other horses, by reason of which overloading the mare perished, to his wrong and damage, etc.

Richmond. Judgment of the writ; for he does not allege any tort in us; he only proves that he would have an action by a writ by way of covenant, or [not?] by way of trespass: wherefore, etc.

BANKWELL, J. It seems that you committed a trespass when you overloaded the boat, whereby his mare perished, etc.; therefore answer.

Richmond. Not guilty.[2]

Y. B. 29 Lib. Ass. 163, pl. 28 [1355]. Suit was brought in the Exchequer by the King's debtor, etc., for a cup which was bailed by him to the defendant, etc. And the defendant said, that the plaintiff bailed

[1] Certain obvious errors in this case have been corrected from the version given in Fitzherbert's Abridgment, Detinue, pl. 59. That version ends as follows: "*Russell.* Not carried away by thieves, ready, etc. *Et alii e contra.* And to this issue the party was driven, etc." — ED.

[2] See 41 Ed. III. 3, pl. 8. — ED.

the cup to him in pledge for certain money, etc., and he put it with his own goods, etc., which were stolen from him. To which the plaintiff was driven to answer: who said, that he tendered the money before the theft, and the defendant refused it, judgment, etc. And he tendered averment that he did not tender before taking; and the other was driven by award to aver the tender before the theft, etc. For W. THORPE, B., said, that if one bails me his goods to keep, and I put them with mine and they are stolen, I shall not be charged, etc. *Quod nota.*

Catesby in Y. B. 2 R. III. 14, pl. 39 [1378]. By this action he asks nothing but an account, which clearly disaffirms property, etc.; for may be that in a writ of account the plaintiff shall recover nothing; for if the thing delivered was of the value of 20*l.*, if the defendant alleges upon his account that he adventured by land and was percase robbed, or on sea and lost, if it be found so, the plaintiff shall recover nothing; for he demands nothing but an account, and more he shall not have, be it more or less.

THE INNKEEPER'S CASE.

COMMON PLEAS, 1410.

[*Y. B.* 11 *Hen. IV.* 45, *pl.* 18.]

A MAN brought a writ of Trespass against an innkeeper, and declared that by the Common Law each innkeeper is obliged safely to keep the things which are within his inn; and declared that he was lodged with him at a certain time, and that his horse was stolen while within the inn.

Skrene. Protesting that we are not a common innkeeper, we say that the plaintiff came to us towards night and prayed to be received into our house; and we told him that we could not be bound to him, because early the next morning we had to be before the sheriff, to extend certain lands by the King's writ. And thereupon he prayed us to give him a key of his chamber, and another of the stable where he should put his horse; and we gave him those same keys, and went our way that same night. And we pray judgment if he may maintain this action against us, etc.

Tildesley. Protesting that we do not admit that he gave us such notice of his going away as he has spoken of until after we were lodged with him, and that meanwhile our horse had been stolen from within his inn, we pray judgment, and ask for our damages. *Et sic ad judicium.*

HANKFORD, J., to *Skrene.* You have not alleged that you were summoned or distrained to come before the sheriff, nor in fact have you alleged that you went to the sheriff and gave attendance upon him by authority of the law; but you have said only that you gave notice to the plaintiff that you were going: and if you were not there, he may

have a traverse of it. And though a common innkeeper make promise by his own head to speak with a sheriff or other man, if he suffers one to lodge with him he answers for his goods; and he is bound to have deputies and servants under him, for well keeping the inn during his absence.

Skrene. When I alleged such notice given to him as to what I had to do before the sheriff, it is to be taken as true in fact, since it is not traversed by the other party.

HILL, J. The bailment of the keys in this case is nothing to the purpose in discharging the innkeeper, as was adjudged long before his day (*quod fuit concessum per Justiciarios*); but when the defendant gave notice to him that he could not attend to him *causa ut supra*, and thereupon the plaintiff took lodging at his peril, he discharged the innkeeper, and took the charge upon himself; wherefore, etc.

THIRNING, C. J. The plaintiff in this case in his declaration has not declared that it was a common inn. Nothing is alleged of record in proof of it, but in the declaration he has declared the common custom as to common inns, and then in the conclusion he has alleged nothing, but that he was lodged with him, so the matter in itself is not sufficient to maintain the action; for though a man who is not a common innkeeper lodge me in his inn, he shall not answer for my goods.

Quod fuit concessum. *Nota* this reason.

Tremayne. When I declared that I was lodged in his inn, it is intended that he is a common innkeeper.

THIRNING, C. J. An action cannot be maintained by argument nor by intendment, but by sufficient matter included and declared. Wherefore it is better for you that your writ be abated for defect of your declaration, and that you pursue a better action.

Tremayne. He has accepted our declaration as good, wherefore, etc.

HANKFORD, J. No matter if he has accepted anything, the court does not allow it.

Then the record was read, and found as Thirning had said, etc.

HANKFORD, J. (*ex assensu omnium sociorum*). You take nothing by your writ, etc., but you are in mercy, etc.

HORSLOW'S CASE.

COMMON PLEAS, 1444.

[*Y. B.* 22 *Hen. VI.* 21, *pl.* 38.]

WRIT of trespass on the case was brought against W. Horslow, laborer, because the Common Law of the land is that the innkeepers who keep common inns ought to safeguard the goods of those who are lodged in their inns, so that no damage should happen to them by persons unknown; and the plaintiff alleged how certain of his goods (and alleged

what) were taken out of his possession in the defendant's house by persons unknown.

Prisot. Judgment of the writ; for the writ is, *Cum secundum legem & cons. Regni,* etc., in which case it appears that the matter aforesaid lies in custom, which shall not be intended the Common Law, etc.

NEWTON, C. J. What is custom of the land but the law of the land? Therefore answer this.

Markam. In Kent perhaps the writ does not rehearse their customs, sc. *cum secundum Legem & consuetudinem,* etc., because they have divers customs which do not extend except within said county, but this is a custom and a law throughout all the realm.

Prisot. Yet judgment on the writ; for the custom is rehearsed as of common inns, and by the writ and count it is not alleged that the defendant's house in which the goods were taken is a common inn; wherefore may be it is not a common inn; and if one be lodged with me, or in the house of a husbandman who is not a common innkeeper, though his goods are taken out of his possession, still he lacks an action.

NEWTON, C. J. The exception is good, and will be corrected at another day.

Markam. We will waive this writ, and take another.

Brown. This writ is good, and the practice no other: and cited two or three precedents.

Prisot. All those writs are *Pone,* etc., such a one, innkeeper, and can be understood no otherwise except that his house is a common inn; but in the case at bar the defendant is not named innkeeper, but W. Horslow, laborer.

Brown. The addition should not be given in this action, because process of outlawry does not lie in said action.

NEWTON, C. J. A laborer may hold a common inn, and *e contra* an innkeeper may have other houses to lodge with his license and good will.

Prisot. If action be brought against the Warden of the Fleet or the Marshal in the King's Bench because of their office, they should be named in their writ by the name of their office; so it seems in the case at bar, the defendant should be named innkeeper.

NEWTON, C. J. In the case you have put the law is as you say; but I may have a common inn and yet such a writ brought against me by my own name is good. And in the case at bar if the house was not a common inn you may suggest it and take advantage of it by way of plea.

ASCUE, J. It seems for another reason that the writ is abatable; for the writ does not mention that the goods were carried into the inn and lodged in it, and carried out of said inn; but the writ is, C. shillings, etc., of the plaintiff *in hospicio* of the defendant *hospitati ceperunt & asportaverunt,* and this word *hospitati* refers to the person of the plaintiff and not to the hundred shillings; for then it would be *hospitantes vel hospitatos;* and it may be by the writ that the plaintiff might lodge in the house of the defendant and that the goods were in the house of another person and carried away; wherefore it seems that the

writ should be, *ibidem inventos cepit & asportavit.* And for this reason they were adjourned. And at another day the writ was held good, etc.

Prisot. You ought not to have an action, for we ourselves delivered to the plaintiff a chamber and a key to it to have and hold in his care to safeguard his goods; and we say that the plaintiff brought with him certain persons unknown into his chamber, who took the said goods. Judgment if action.

Markam. That plea amounts to no more than that the goods were not taken in your default.

NEWTON, C. J. The plea is good, if he give names in certain to those who took the goods; for the persons are unknown to him, and for such a taking the law excuses him.

Wherefore *Prisot* alleged their names, sc. Tho. T. and W.

Markam. Said T. & W., whom we carried with us into the chamber did not carry away the goods.

NEWTON, C. J. That is a negative pregnant; one, that they did not carry away the goods; the other, that they did not come into his chamber at his request; but the plea is good, that the said W. and T. did not carry away said goods; or else you may deny that the said W. and T. came into the said chamber at your request.

Prisot. To oust ambiguities we say that the goods were not carried away in our default.

FULTHORPE, J. That is no issue.

Brown. Such an issue has been taken and entered before this time.

And afterwards *Prisot* pleaded the first bar, as above.

Markam. We did not carry said W. and T. with us into the chamber, ready. *Et alii e contra.*

Markam. Still this is perhaps a jeofail. Suppose I with my good will suffer a stranger to lodge with me in the inn, and in my chamber, which stranger robs me, and I do not know him, shall not the innkeeper be charged with it?

NEWTON, C. J., and All the Court. No, sir, when he was not lodged in your chamber by the innkeeper, but by your own sufferance; but if he was lodged with you by the innkeeper, then the innkeeper shall be charged. And suppose that your own servant who is with you in the inn robs you, shall the innkeeper be charged? Certainly not. Therefore the issue is good.

THE MARSHAL'S CASE.

COMMON PLEAS, 1455.

[*Y. B.* 33 *Hen. VI.* 1, *pl.* 3.]

DEBT was brought against the marshal of the King's Bench. And the plaintiff counts on the Statute, and that one T. who was condemned to the plaintiff in a certain sum in an Assize of Novel Disseizin sued a

writ of Error before the King; and then the judgment was affirmed, and the said T. was put in guard to the Marshal for the sum; and that he let him go at large, to his wrong and damage.

Choke. No action lies; for he says that a great multitude of the King's enemies on such a day and year came to Southwark and they then broke open the prison of our Lord the King, and took the prisoners then therein out of the prison, to wit the said T. and others, and carried them away against the will of the Marshal; without this, that he let him go at large *aliter vel aliquo alio modo.*

Billing and *Laicon.* To this plea pleaded in manner, etc.

Choke. If enemies from France or other enemies of the King were here, the Marshal would be discharged; as if they had burned a house of a tenant for life, he should be discharged of waste; or otherwise if the house were burned by a sudden tempest, then he would be discharged; so here.

DANBY, J. In your case of the King's enemies and of the sudden tempest it is right; for then there was no remedy against any one; but it is otherwise where subjects of the King do it; for there you may have action against them.

Choke. Sir, the Captain is dead, and all the others are unknown.

PRISOT, C. J. If they were subjects of the King, they could not be called enemies of the King, but traitors; for enemies are those who are out of his allegiance; but if they were alien enemies it would be a good plea without any doubt. But if there were twelve or twenty subjects of the King, and unknown, and one night they broke open the prison and took them out, etc., in that case the Marshal shall be charged for his negligent guard; so here. But if it were by a sudden accident with fire, and the prison were burned, and they escaped, perhaps it is otherwise.

Choke. If a stranger comes to my house, and by his folly burns it, so that other houses of my neighbor are burned, I shall not be charged with burning my neighbor's house. And, sir, if a subject of the King joins with enemies of the King like that, and then they come here and do such a thing, it shall be taken as a thing done by the King's enemy.

PRISOT, C. J. In your case he shall not be taken prisoner here, and [allowed] to make ransom as an enemy may; but he shall be taken as traitor to the King.

Choke. Then we say that there were 4,000 Scots and other enemies of the King with the other traitors, etc.

DANBY, J. Then you ought to allege the matter more specially, and some of their names. *Et adjournatur.*

Broke's Abridgment, Detinue, 27 [1469]. Account. *Jenney.* If I bail goods to you and you are robbed of them, that shall excuse you. DANBY, C. J. If he receives them to keep as his own goods, then it is a good excuse; and otherwise not.

THE SHEPHERD'S CASE.

KING'S BENCH, 1487.

[*Y. B.* 2 *Hen. VII.* 11, *pl.* 9.]

THE case was such. A man had a hundred lambs to keep, and negligently through his default they were destroyed by his sufferance.

Read. It seems that the action does not lie; for action on the Case does not lie for a nonfeasance, for the party shall have a writ of Covenant for it. For if one has cloths to keep and they are motheaten or rotted, no action on the Case lies, but action of Detinue.

Wood. It seems to me that the action well lies; for suppose one takes upon himself to carry glass or pots, and negligently breaks them, I shall have action on my Case, etc.

Keble said that nonfeasance shall not give rise to action on the Case; for before the Statute of Laborers if a servant who was hired would not do service to his master no action lay for his nonfeasance, etc.

And it was argued, that if any act be done by the party, then action will lie well enough. As if I bail a chest with obligations, and he breaks into it, or bail a horse to ride ten leagues and he rides twenty, action on the case lies; or in this case if the party had driven the lambs into the water action on the case would lie.

TOWNSEND, J. When the party undertook to keep the lambs, and afterwards allowed them to be destroyed by his default, since he had taken them and executed his bargain, and had them in his custody, and then did not attend to them, action lies. For here is his act, sc. his agreement with the undertaking, and this afterwards is broken on his part, and this shall give rise to the action. And suppose a horse be bailed to a man to keep, and afterwards he does not give him sustenance, whereby he dies, action on the case lies. Or if a carrier takes my goods to carry, and afterwards he loses or breaks them, action lies to make him answer for it, because he has not executed his bargain, and has taken upon him to do the thing. But if a covenant were made with me to keep my horse or to carry my goods, and it was not done, now action of Covenant lies, and no other action; for in those cases he never executed his promise.

Y. B. 10 Hen. VII. 26, pl. 3 [1495]. *Keble* (*arguendo*). I bail deeds and evidences to a man to guard generally. Now if his own goods and the evidences are stolen, he shall be excused towards the party, as I understand, for this keeping is chargeable to him to all intents as reason may expound, as I shall keep my own goods, etc. . . .

FINEUX, J. To the contrary, and denied the case of bailment of goods, and said that the bailee should be charged as he understood, though his own goods were stolen.

Fisher. To the same intent; and said as an innkeeper has the keeping of the goods; he shall be charged notwithstanding they are stolen, and he has no remedy over; so here.

Doctor and Student, c. 38 [1518]. It is commonly holden in the laws of England, if a common carrier go by the ways that be dangerous for robbing, or drive by night, or in other inconvenient time, and be robbed; or if he overcharge a horse whereby he falleth into the water, or otherwise, so that the stuff is hurt or impaired; that he shall stand charged for his misdemeanor: and if he would percase refuse to carry it, unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were void, for it were against reason and against good manners, and so it is in all other cases like.[1]

FITZHERBERT, Natura Brevium, 94 d [1534]. If a smith prick my horse with a nail, etc., I shall have my Action on the Case against him, without any warranty by the smith to do it well. . . . For it is the duty of every artificer to exercise his art rightly and truly as he ought.

DALL. 8 [1553]. Note by BROWNE, J., and PORTMAN, J. As clear law; if a common carrier takes a pack of stuff from a man to carry it to D. and while in a common inn the pack is taken and stolen, the owner for this shall have an action against the innkeeper for the stuff and the carrier shall not; for they are not the goods of the carrier, nor shall he be charged with them inasmuch as he was by law compellable to carry them; and it is not like where one takes goods to carry generally, for if he be robbed, it shall be charged to the carrier for his general taking, to which he was not compellable, and so he shall have action over in respect of his liability. And 2 H. IV. the master shall have action for his goods robbed from his servant in an inn, and although there was not a direct writ for the master in the register in this case, still by the statute the clerks agree to make a writ for him; and if it pass the Chancery it is well enough. HALES, J., acc.

ANONYMOUS.

COMMON PLEAS, 1558.

[*Moore*, 78, *pl.* 207.]

ONE came to an inn, and the innkeeper said to him, "here are persons resorting to this house, and I know nothing about their behavior; therefore take the key of such a chamber and put your goods there at your own risk, for I will take no responsibility for them;" and afterwards the goods were stolen. The party brought action on the Case against the innkeeper.

Wray. The innkeeper is responsible by the law for all the goods which come to his inn; and by the law he cannot discharge himself by such words.

[1] Noy (*1631), Maxims, *92, repeats this. — ED.

Harper. We will demur.

Browne, J. Then we will quickly make an end of it.

Harper. My client has instructed me in this way, and I have no more to say.

Browne, J. You have the more to pay; the innkeeper may take issue, that the goods were not stolen by his negligence.

ANONYMOUS.

Queen's Bench, 1589.

[1 *Harvard Manuscript Reports*, 3*a*.]

It was held by all the Justices in the Queen's Bench, that if a man bail certain cloths to a tailor to make a robe of them, who does so, and then it is stolen out of his shop, still he shall be accountable for it; the same is law of a carrier who has anything for his labor. But it is otherwise of him who has nothing for keeping it, but keeps it of his good will.

WOODLIFE'S CASE.

Queen's Bench, 1597.

[*Moore*, 462.]

In account upon merchandise delivered for merchandising, the defendant said that he was robbed of this merchandise, and of divers other goods and chattels of his own.

Popham, C. J. It seems a good plea.

Gawdy, J., *e contra.* It is no plea for a carrier, because he is paid for the carriage.

Popham, J. But it is a good plea for a factor, servant, and the like.[1]

MOSLEY *v.* FOSSET.

Queen's Bench, 1598.

[*Moore*, 543.]

Action on the case, and declares that the defendant took from the plaintiff a gelding to agist him for 2*s.* a week, and the defendant

[1] The same case is reported in 1 Rolle's Abridgment, 2, as follows: "If a man deliver goods to a common carrier to carry, and the carrier is robbed of them, still he shall be charged with them, because he had hire for them, and so implicitly took upon him the safe delivery of the goods; and therefore he shall answer for the value of them if he be robbed." — Ed.

was to keep him safely and redeliver when he should be asked to do so: and alleges that he so negligently kept him that he was taken by persons unknown. The defendant demurred, and the Justices were divided, two against two: POPHAM, C. J., and FENNER, J., that the action does not lie without alleging request for redelivery, and also alleging how the horse was taken away, dead, or lost. GAWDY and CLENCH, JJ., *è contra*, because the action is founded on the negligence and the special assumpsit to keep safely. But all agree that without such special assumpsit the action does not lie.

SOUTHCOTE'S CASE.

QUEEN'S BENCH, 1600.

[4 *Coke*, 83 *b*.]

SOUTHCOTE brought *Detinue* against Bennet for certain goods, and declared, that he delivered them to the defendant to keep safe; the defendant confessed the delivery, and pleaded in bar that after the delivery one J. S. stole them feloniously out of his possession: the plaintiff replied, that the said J. S. was the defendant's servant retained in his service, and demanded judgment, etc. And thereupon the defendant demurred in law, and judgment was given for the plaintiff:[1] and the reason and cause of their judgment was, because the plaintiff delivered the goods to be safe kept, and the defendant had took it upon him by the acceptance upon such delivery, and therefore he ought to keep them at his peril, although in such case he should have nothing for his safe keeping. So if A delivers goods to B generally to be kept by him, and B accepts them without having anything for it, if the goods are stole from him, yet he shall be charged in *Detinue;* for to be kept and to be kept safe, is all one. But if A accepts goods of B to keep them as he would keep his own proper goods, there, if the goods are stolen, he shall not answer for them: or if goods are pawned or pledged to him for money, and the goods are stolen, he shall not answer for them, for there he doth not undertake to keep them but as he keeps his own; for he has a property in them and not a custody only, and therefore he shall not be charged as it is adjudged in 29 Ass. 28. But if before the stealing he who pawned them tendered the money, and the other refused, then there is fault in him; and then the stealing after such tender, as it is there held, shall not discharge him; so if A delivers to B a chest locked to keep, and he himself carries away the key, in that case if the goods are stolen, B shall not be charged, for A did not trust B with them, nor did B undertake to keep them, as it is adjudged in 8 E. II. *Detinue*, 59.

[1] *Per* GAWDY *et* CLENCH, JJ., *caeteris absentibus:* see s. c. Cro. Eliz. 815. — ED.

So the doubt which was conceived upon sundry differing opinions in our books in 29 Ass. 28. 3 H. VII. 4, 6 H. VII. 12, 10 H. VII. 26 of Keble and Fineux, are well reconciled, *vide* Bract. lib. 2, fol. 62 b. But in accompt it is a good plea before the auditors for the factor, that he was robbed, as appears by the books in 12 E. III. Accompt, 111, 41 E. III. 3, and 9 E. IV. 40. For if a factor (although he has wages and salary) does all *that* which he by his industry can do, he shall be discharged, and he takes nothing upon him, but his duty is as a servant to merchandise the best that he can, and a servant is bound to perform the command of his master: but a ferryman, common innkeeper, or carrier, who takes hire, ought to keep the goods in their custody safely, and shall not be discharged if they are stolen by thieves, *vide* 22 Ass. 41 Br. *Action sur le Case*, 78. And the Court held the replication idle and vain, for *non refert* by whom the defendant was robbed, *vide* 33 H. VI. 31a. b. If traitors break a prison, it shall not discharge the gaoler; otherwise of the King's enemies of another kingdom; for in the one case he may have his remedy and recompense, and in the other not. *Nota* reader, it is good policy for him who takes any goods to keep, to take them in a special manner, *scil.* to keep them as he keeps his own goods, or to keep them the best he can at the peril of the party; or if they happen to be stolen or purloined, that he shall not answer for them; for he who accepteth them, ought to take them in such or the like manner, or otherwise he may be charged by his general acceptance. So if goods are delivered to one to be delivered over, it is good policy to provide for himself in such special manner, for doubt of being charged upon his general acceptance, which implies that he takes upon him to do it.

MORSE *v.* SLUE.

King's Bench, 1671–72.

[2 *Keb.* 866, 3 *Keb.* 72, 112, 135: 1 *Vent.* 190, 238: *T. Raym.* 220: 2 *Lev.* 69: 1 *Mod.* 85.][1]

An action upon the case was brought by the Plaintiff against the Defendant; and he declared, That whereas, according to the law and custom of England, masters and governors of ships which go from London beyond sea and take upon them to carry goods beyond sea, are bound to keep safely day and night the same goods, without loss or substraction, *ita quod pro defectu* of them, they may not come to any damage; and whereas the 15 of May last, the defendant was master of a certain ship called the *William and John*, then riding at the Port of London, and the plaintiff had caused to be laden on board her three trunks, and therein 400 pair of silk stockings and 174 pounds of silk,

[1] The declaration and the special verdict are taken from the report by Ventris; the rest of the case is as reported by Keble. — Ed.

by him to be transported for a reasonable reward of freight to be paid, and he then and there did receive them, and ought to have transported them, etc., but he did so negligently keep them, that in default of sufficient care and custody of him and his servants, 17 May, the same were totally lost out of the said ship.[1]

Upon Not guilty pleaded, a special verdict was found, viz.:

That the ship lay in the River of Thames, in the Port of London, in the Parish of Stepney, in the County of Middlesex, *prout,* etc. That the goods were delivered by the plaintiff on board the ship, *prout*, etc., to be transported to Cadiz in Spain. That the goods being on board, there were a sufficient number of men for to look after and attend her, left in her. That in the night came eleven persons on pretence of pressing of seamen for the King's service, and by force seized on these men (which were four or five, found to be sufficient as before) and took the goods. That the master was to have wages from the owners, and the mariners from the master. That she was of the burthen of 150 tons, etc.

So the question was, upon a trial at bar, whether the master were chargeable upon this matter.

Holt, for the Plaintiff. The master receives these goods generally to keep, as 4 Co. 83, Southcot's Case; Co. Lit. 89; and only guardian in socage who hath the custody by law, and factor who is servant at the master's dispose, and so cannot take care, are exempt.

2d. The master is to have a reward for his keeping and therefore the proper person against whom the action should be is he. This is the reason (2 Cro. 188, Jelly and Clerke) of a Carrier, hoyman, and innkeeper: thus Moore, 876, pl. 1229, and in Hob. 18, Rich and Needham's Case. And though the master hath his salary from the owners, yet the contract for freight is made by the master in his own name with the merchant, and the master is to do that which is consequence of it, to keep the goods. And were he a servant (Doctor & Student, 137), if he contract in his own name (Dyer, 230, 2 Cro. 250, Yelv. 137, pl. 194) he is the principal debtor. Also in the Civil Law *exercitor navis* takes no care of freight, therefore this master is but a servant, and the action against him only *exercitoria*, because the owner took all the care to lade and freight wine; as Plowd. 827. But the *exercitor* now is *per aversionem* the master who takes care of all.

3d. The master of the ship hath a remedy over against the wrongdoers, as Lit. Co. 54, on permissive waste. So gaoler (33 Hen. VI. 1) on traitors breaking prison. Also the master he may have trespass or an appeal of robbery, and on a fresh suit (Keil. 70) he shall have restitution, and the damages recovered by the master shall bar the owners; so Haydon and Smyth, 13 Co. 69. Also the mischief is great if no action lie, by reason of the great trust merchants put in the master, and and therefore he need not prove any particular defaults (as *de lege Nautica,* Plowd. 3, 15, 29, and in Antonius Fogassa, 822), though the

[1] There appears to have been a second count in case as against a mere bailee, for negligence in not guarding the goods. 2 Keb. 866.—Ed.

injuries happen without the master's default, *miles fatale divum accideret, Lex Mercatoria,* 103. Also the bills of lading show this, "that the goods well received are to be redelivered, the dangers of the sea only excepted," which cannot be foreseen nor avoided; and this differs from piracy, which (as Loccenius, 121, and 3 Inst. 112) is a danger at sea or common enemies (and Loccenius *de jure maritimo,* 140, Strecka *de mercatura,* 448). Also here is a neglect in the master having no greater guard than four; which is found to be the usual number, but not by time out of mind, or by custom or prescription. Also the men that robbed were permitted to enter, but it was found they pretended to be press masters.

Winnington, for the Defendant. 1st. That here is no such neglect as to ground an action upon; the declaration being on the custom of England, as against innkeeper, carrier, etc. (Register, 105, and F. N. B. 94 b), yet in neither is there any precedent against master of the ship nor other, but what is grounded on wilful or legal neglect. And this nonfeasance and want of sufficient numbers cannot be a neglect in law (as 8 Co. 33, Calye's Case, 4, resolved; 22 Hen. VI. 21 and 38; 2 Hen. IV. 7 b; Dyer, 158 and 266, Spencer's Case; and Hil. 32 Eliz. 1, Roll. 3 and Moore, 462, pl. 650, Woodlif's Case); for he that loseth these goods is not to pay the defendant anything, but to the owners of the ship, whose servant the master is *pro hac vice;* and in Hob. 17 a reward is expressly averred to be given to the hoyman, and the master's possession is the owners'. Also here is a custom found that four was the usual number, which in verdict is sufficient without saying time out of mind (Lit. Co. 182). Also (Wellwood's Abridgment) the duty of the master of the ship is only to look to the goods, but not to answer for them.

2d. Supposing a neglect on which the merchant should have remedy, it lyeth not against the master but against the part owners, here being no charter-party found; whereby if the master be partner he is liable, but else the master is a bare servant, and sueth owners for salary. . . .

3d. Here is not guilty found as to the point of neglect on which the later part of the declaration is as a special action upon the Case; but it's left on the common custom, as Carrier, etc. *Sed adjournatur.*

Tuesday, Jan. 28. *Wallop,* for the Plaintiff. At the common law on the general bailment it's against the defendant. 2. As a public carrier. And 3. as a master of a ship. As to the first is inferred that *de custodia tenetur* strictly (4 Co. 83, Southcot's Case; 1 Inst. 89); and the like of a simple *depositorius* (in Inst., lib. 3, cap. ; so Bract. 99, and Grotius, lib. 2, cap. 10, § 13, *de Jure Belli*) whose office is merely gratuitous.

2d. As of public profession, as he hath privilege so he hath trust and obligation, which is the reason the Civil Law hold them strictlier to it (Pecchius, 36), as an innkeeper (*Caupones Nautae et Tabularii;* Hob. 18; Cro. Jac. 330, Rich *v.* Kneeland). And that the defendant is but a servant doth not appear by his receiving salary. For

3d. he is master of a ship, and a judicial officer of universal note (Loccenius, lib. 2, cap.); he hath care of the whole ship, and by

the Laws of Oleron may pawn the ship (as Hob. 2, Bridgman's Case), which is more than an ordinary servant. Also he transacts all without notice of the owners, especially where there is no charter-party as here (Pecchius, 126); *ad magistrum respiciunt contrahentes.* That against the owners is *dativa actio*, not *ex contractu unius* (see Pecchius, 132); the owners are but as fidejussors, and the master is the principal (*Lex Mercatoria*, 14, and Wellwood, 87, *Abridgment of Sea Laws*). He hath his office by public law, not by a private command (2 Hen.V. cap. 6). A sworn officer, and may impose pecuniary or corporal punishments on mariners, as steward of a manor; the master acts *officii praecepto*, a procurator, but as delegate the merchant may charge the owners or (1 Inst. 385) the master at election or the owners on insufficiency of the master. *Quoad habitum et proprietatem* the ship belongs to owners, but *quoad exercitium* it belongs to the master, as cure is divided between parson and vicar; and the salary is but as a fee of an officer (2 Inst. 463), though (1 Inst. 233) removable at will. 2. By the law of merchants the defendant ought to be charged. The 51 Rhodian Laws in Morison do include *exercitores* as well as the master; them *actione exercitoria*, him *actione civili*. The master may by his neglect bind himself and the owner to the merchant, but not contrary. The second and third law of Oleron obliges the master to answer for neglects (Bronchurst *de reg. juris*, 58; 1 Cro. 353) of *crassa* or *lata culpa* or *de culpa levissima*, and the having the usual number is not *diligentia exactissima* (Bronch. 61).

Molloy, for the Defendant. Freight was by Cape Merchant generally, he that hired a dead vessel: there the owner ran no risk. 2. A Cape Merchant special, which is now usual to take in by tonnage. 3. There was an under-freighter, which is the case in question with bills of lading (Van Luen's Digest). And in both those cases the owners are answerable. 4. On Cotton, 63, there were exercitors that of themselves undertook. All the first and last sort are obsolete, but the second and third now used. And the master is chosen but as a servant for his skill, and is answerable for his neglects only; and if he be in no fault he is discharged. And the merchant shall not be in better condition against the master than the owners have for the ship's furniture (9 Edw. IV. 40; Lane, 68; 2 Cro. 266). Also the Statute 32 Hen. VIII. cap. 4, that gives the Admiral concurrent jurisdiction herein, shows the delivery special in this case, therefore called merchant adventurers, and the master cannot be presumed to keep the merchant's goods safer than his own (2 Bulst. 209; Keil. 77; Doctor & Student, 38). Also the master hath no benefit by this delivery (4 Co. 48; Dyer, 239); therefore he that hath the benefit shall answer, which is the owner's (18 Hen. VI 25 in 4 Inst. 146; Digest. *de exercitoria actione*, L. 1, § 3; Registre, 100; Worrall and Bradshaw's Case, 9 Jac.[1]). There is elec-

[1] Reported in Harvard MS. Reports, 9 Jac.; *ibid.* 2-22 Jac., as follows: "Between Worrall and Bradshaw it was held, that where goods are delivered to the servant of a carrier to carry them, etc., action of trover does not lie against the carrier, but special action on the case." — Ed.

tion by the marine law on wilful neglect, not else; also the ship is instead of the owners (1 Roll. 530) and therefore is answerable (2 Rich. III. 2; Stat. 54). Taking alters the property spoiled by alien (F. N. B. 114, Regist. 129), for which letters of mart are given. Also piracy (13 Jac. Bellingham's Case) though illegal shall not make the master answerable, but for *spoliatio in navi* he shall answer (as Grotius *Digest. de famosis libellis;* and by the Laws of Oleron, cap. 5; Clyrak's Coment. in French, in Lincoln's Inn Library; Tr. 24 Ed. III. tit. Bristol, no. 45, in Pruyn's Records). The master is not answerable for goods stolen out of the ship moored at anchor in pool where there is a sufficient number of men (Digest. 33; 1 Roll. 560, Ferns and Smyth), but only for his own faults.

2d. This is not like a common hoyman with small vessels [which] are common carriers and so accounted (27 Ed. III. cap. 15); but not ships (so Pasch. 13 Ed. IV. 19, and 1 Roll. 536). There is the like difference, Hill. 19 Car. II. in Exchequer in *Quo Warranto* against the City of London for water bailage; it was resolved the duty was not due of great ships that come from foreign parts, but only of smaller vessels. And these have remedy against the county as other travellers (22 Ass. ; Davis, in the case of the Bank); but not the others, being (4 Inst. 147) floating castles, and none can enter into them for their safety, nor can the hundred take notice of their robbery (7 Co. 7, Sandal's Case) nor assist with naval provisions. And this will discourage navigation; and is without precedent or practice, but the master always discharged.

The Court [per HALE, C. J.] agreed the master shall not answer for inevitable damage, nor the owners neither without special undertaking: when it 's *vis cui resisti non potest.* But for robbery the usual number to guide the ship must be increased as the charge increaseth. And the master is not a mere servant; for freight is the mother of wages, and one lost with the other, therefore this is money paid by the merchant.

And the Court inclined strongly for the plaintiff.

Saturday, Feb. 8.

Per totam Curiam. By the civil law and *lex mercatoria*, the master is liable so long as he is within the King's protection: And by our law, being within the body of the county, wages beginning here. And when he took in the goods he might have cautioned against them, not to take them in till farther time; as carrier that is not told what is in a box taken in, is liable for money, etc., unless he cautions against money. Also this differs not from a hoyman. For the master is an officer and not an ordinary servant, but as a gaoler who is chargeable for escapes, though *respondeat superior* for his default; but a turnkey is but a servant, not liable. Also the owner receives freight in respect of this care, and whether he receives it from them or the merchant is not material. Also though the guard be sufficient for the ship, yet (33 Hen. VI. 1) he must have sufficient guard for the goods; nor is this excuse of the carrier unless in case of common enemies.

Judgment for the Plaintiff.

COGGS *v.* BERNARD.

QUEEN'S BENCH, 1703.

[2 *Lord Raymond*, 909.]

IN an action upon the case the plaintiff declared, quod cum Bernard the defendant, the 10th of November, 13 Will. 3, at, &c., assumpsisset, salvo et secure elevare, *Anglice* to take up, several hogsheads of brandy then in a certain cellar in D., et salvo et secure deponere, *Anglice* to lay them down again, in a certain other cellar in Water Lane, the said defendant and his servants and agents tam negligenter et improvide put them down again into the said other cellar, quod per defectum curæ ipsius the defendant, his servants and agents, one of the casks was staved, and a great quantity of brandy, viz. so many gallons of brandy, was spilt. After not guilty pleaded, and a verdict for the plaintiff, there was a motion in arrest of judgment, for that it was not alleged in the declaration that the defendant was a common porter, nor averred that he had anything for his pains. And the case being thought to be a case of great consequence, it was this day argued *seriatim* by the whole court.

GOULD, Justice. I think this is a good declaration. The objection that has been made is, because there is not any consideration laid. But I think it is good either way, and that any man that undertakes to carry goods is liable to an action, be he a common carrier or whatever he is, if through his neglect they are lost or come to any damage; and if a premium be laid to be given, then it is without question so. The reason of the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect. But if a man undertakes to build a house, without anything to be had for his pains, an action will not lie for non-performance, because it is *nudum pactum*. So is the 3 H. 6, 36. So if goods are deposited with a friend, and are stolen from him, no action will lie. 29 Ass. 28. But there will be a difference in that case upon the evidence, how the matter appears; if they were stolen by reason of a gross neglect in the bailee, the trust will not save him from an action, otherwise if there be no gross neglect. So is Doct. & Stud. 129 upon that difference. The same difference is where he comes to goods by finding. Doct. & Stud. *ubi supra*, Ow. 141. But if a man takes upon him expressly to do such a fact safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him. If it be only a general bailment, the bailee will not be chargeable without a gross neglect. So is Keilw. 160, 2 H. 7, 11, 22 Ass. 41, 1 R. 10. Bro. Action sur le case, 78. Southcote's Case is a hard case indeed, to oblige all men, that take goods to keep, to a special acceptance that they will keep them as safe as they would do their own, which is a thing no man living that is not a lawyer could think of; and indeed it appears by the report of that case in Cro. El. 815, that it was adjudged by two judges only, viz. GAWDY and CLENCH. But in 1 Ventr.

121 there is a breach assigned upon a bond conditioned to give a true account, that the defendant had not accounted for £30, the defendant showed that he locked the money up in his master's warehouse, and it was stole from thence, and that was held to be a good account. But when a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he had the goods committed to his custody upon those terms.

POWYS agreed upon the neglect.

POWELL. The doubt is, because it is not mentioned in the declaration that the defendant had anything for his pains, nor that he was a common porter, which of itself imports a hire, and that he is to be paid for his pains. So that the question is, whether an action will lie against a man for doing the office of a friend, when there is not any particular neglect shown. And I hold an action will lie, as this case is. And in order to make it out, I shall first show that there are great authorities for me, and none against me; and then, secondly, I shall show the reason and gist of this action; and then, thirdly, I shall consider Southcote's Case.

1. Those authorities in the Register, 110, a, b, of the pipe of wine, and the cure of the horse, are in point, and there can be no answer given them but that they are writs which are framed short. But a writ upon the case must mention everything that is material in the case, and nothing is to be added to it in the count but the time and such other circumstances. But even that objection is answered by Rast. Entr. 13, e., where there is a declaration so general. The year books are full in this point. 43 Ed. 3, 33, a., there is no particular act showed. There, indeed, the weight is laid more upon the neglect than the contract. But in 48 Ed. 3, 6, and 19 H. 6, 49, there the action is held to lie upon the undertaking, and that without that it would not lie; and therefore the undertaking is held to be the matter traversable, and a writ is quashed for want of laying a place of the undertaking. 2 H. 7, 11, 7 H. 4, 14, these cases are all in point, and the action adjudged to lie upon the undertaking.

2. Now, to give the reason of these cases, the gist of these actions is the undertaking. The party's special *assumpsit* and undertaking obliges him so to do the thing, that the bailor come to no damage by his neglect. And the bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest, &c. So is it 1 Jones, 179, Palm. 548. For the bailee is not bound upon any undertaking against the act of God. Justice JONES in that case puts the case of the 22 Ass., where the ferryman overladed the boat. That is no authority, I confess, in that case, for the action there is founded upon the ferryman's act, viz. the overlading the boat. But it would not have lain, says he, without that act; because the ferryman, notwithstanding his undertaking, was not bound to answer for storms. But that act would charge him without any undertaking, because it was his own wrong to overlade the boat. But bailees are chargeable in case of other accidents, because they have

a remedy against the wrong doers; as in case the goods are stolen from him, an appeal of robbery will lie, wherein he may recover the goods, which cannot be had against enemies, in case they are plundered by them; and therefore in that case he shall not be answerable. But it is objected, that here is no consideration to ground the action upon. But as to this, the difference is between being obliged to do the thing, and answering for things which he has taken into his custody upon such an undertaking. An action, indeed, will not lie for not doing the thing, for want of a sufficient consideration; but yet if the bailee will take the goods into his custody, he shall be answerable for them; for the taking the goods into his custody is his own act. And this action is founded upon the warranty, upon which I have been contented to trust you with the goods, which without such a warranty I would not have done. And a man may warrant a thing without any consideration. And therefore, when I have reposed a trust in you, upon your undertaking, if I suffer when I have so relied upon you, I shall have my action. Like the case of the Countess of Salop. An action will not lie against a tenant at will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration the lessor would let him live in the house, he promised to deliver up the house to him again in as good repair as it was then, the action would have lain upon that special undertaking. But there the action was laid generally.

3. Southcote's Case is a strong authority, and the reason of it comes home to this, because the general bailment is there taken to be an undertaking to deliver the goods at all events, and so the judgment is founded upon the undertaking. But I cannot think that a general bailment is an undertaking to keep the goods safely at all events. That is hard. Coke reports the case upon that reason, but makes a difference, where a man undertakes specially to keep goods as he will keep his own. Let us consider the reason of the case. For nothing is law that is not reason. Upon consideration of the authorities there cited, I find no such difference. In 9 Ed. 4, 40, b, there is such an opinion by DANBY. The case in 3 H. 7, 4, was of a special bailment, so that that case cannot go very far in the matter. 6 H. 7, 12, there is such an opinion, by the by. And this is all the foundation of Southcote's Case. But there are cases there cited which are stronger against it, as 10 H. 7, 26, 29 Ass. 28, the case of a pawn. My lord Coke would distinguish the case of a pawn from a bailment, because the pawnee has a special property in the pawn; but that will make no difference, because he has a special property in the thing bailed to him to keep. 8 Ed. 2, Fitzh. Detinue, 59, the case of goods bailed to a man, locked up in a chest, and stolen; and for the reason of that case, sure it would be hard that a man that takes goods into his custody to keep for a friend, purely out of kindness to his friend, should be chargeable at all events. But then it is answered to that, that the bailee might take them specially. There are many lawyers don't know that difference, or however it may be with them, half mankind never heard of it. So for these

reasons, I think a general bailment is not, nor cannot be taken to be, a special undertaking to keep the goods bailed safely against all events. But if a man does undertake specially to keep goods safely, that is a warranty, and will oblige the bailee to keep them safely against perils, where he has his remedy over, but not against such where he has no remedy over.

HOLT, Chief Justice. The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely, and he managed them so negligently, that for want of care in him some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guildhall. There has been a motion in arrest of judgment, that the declaration is insufficient, because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labor. So that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

I have had a great consideration of this case, and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question, whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to show the grounds upon which a man shall be charged with goods put into his custody, I must show the several sorts of bailments. And there are six sorts of bailments. The first sort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a *depositum*, and it is that sort of bailment which is mentioned in Southcote's Case. The second sort is, when goods or chattels that are useful are lent to a friend gratis, to be used by him; and this is called *commodatum*, because the thing is to be restored in *specie*. The third sort is, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin *vadium*, and in English a pawn or a pledge. The fifth sort is, when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is, when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them gratis, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation which is upon persons in cases of trust.

As to the first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider for what things such a bailee is answerable. He is not answerable if they are stole without any fault

in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. There is, I confess, a great authority against me, where it is held that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted, to keep them only as you will keep your own. But my lord Coke has improved the case in his report of it, for he will have it that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason nor justice in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law, upon which it is grounded; and therefore it is incumbent upon them that advance this doctrine, to show an undisturbed rule and practice of the law according to this position. But to show that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this matter, and by them show that there never was any such resolution given before Southcote's Case. The 29 Ass. 28 is the first case in the books upon that learning, and there the opinion is, that the bailee is not chargeable if the goods are stole. As for 8 Edw. 2, Fitz. Detinue, 59, where goods were locked in a chest and left with the bailee, and the owner took away the key, and the goods were stolen, and it was held that the bailee should not answer for the goods. That case, they say, differs, because the bailor did not trust the bailee with them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest. For the bailee has as little power over them when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 Edw. 4, 40, b, was but a debate at bar. For DANBY was but a counsel then, though he had been Chief Justice in the beginning of Ed. 4, yet he was removed, and restored again upon the restitution of Hen. 6, as appears by Dugdale's Chronica Series. So that what he said cannot be taken to be any authority, for he spoke only for his client; and *Genney* for his client said the contrary. The case in 3 Hen. 7, 4, is but a sudden opinion, and that but by half the court; and yet that is the only ground for this opinion of my lord Coke, which besides he has improved. But the practice has been always at Guildhall to disallow that to be a sufficient evidence to charge the bailee. And it was practised so before my time, all Chief Justice PEMBERTON'S time, and ever since, against the opinion of that case. When I read Southcote's Case heretofore, I was not so discerning as my brother POWYS tells us he was, to disallow that case at first, and came not to be of this opinion till I had well considered

and digested that matter. Though I must confess reason is strong against the case to charge a man for doing such a friendly act for his friend, but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For if he keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own is an argument of his honesty. *A fortiori*, he shall not be charged where they are stolen without any neglect in him. Agreeable to this is Bracton, lib. 3, c. 2, 99, b, J. S., apud quem res deponitur, re obligatur, et de ea re, quam accepit, restituenda tenetur, et etiam ad id, si quid in re deposita dolo commiserit; culpæ autem nomine non tenetur, scilicet desidiæ vel negligentiæ, quia qui negligenti amico rem custodiendam tradit, sibi ipsi et propriæ fatuitati hoc debet imputare. As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen with his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow. So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods than he takes of his own. This Bracton I have cited is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in Justinian's Inst. lib. 3, tit. 15. There the law goes farther, for there it is said, Ex eo solo tenetur, si quid dolo commiserit: culpæ autem nomine, id est, desidiæ ac negligentiæ, non tenetur. Itaque securus est qui parum diligenter custoditam rem furto amiserit, quia qui negligenti amico rem custodiendam tradit, non ei, sed suæ facilitati id imputare debet. So that a bailee is not chargeable without an apparent gross neglect. And if there is such a gross neglect, it is looked upon as an evidence of fraud. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words, yet even that won't charge him with all sorts of neglects. For if such a promise were put into writing, it would not charge so far, even then. Hob. 34, a covenant, that the covenantee shall have, occupy, and enjoy certain lands, does not bind against the acts of wrong doers. 3 Cro. 214, *acc.* 2 Cro. 425, *acc.* upon a promise for quiet enjoyment. And if a promise will not charge a man against wrong doers, when put in writing, it is hard it should do more so when spoken. Doct. & Stud. 130 is in point, that though a bailee do promise to redeliver goods safely, yet if he have nothing for the keeping of them, he will not be answerable for the acts of a wrong doer. So that there is neither sufficient reason nor authority to support the opinion in Southcote's Case; if the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect. As to the second sort of bailment, viz. *commodatum* or lending gratis, the borrower is bound to the strictest care and diligence, to keep the goods so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect, he will be answerable; as if a man should

lend another a horse, to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in Bracton, *ubi supra;* his words are, Is autem cui res aliqua utenda datur, re obligatur, quæ commodata est, sed magna differentia est inter mutuum et commodatum; quia is qui rem mutuam accepit, ad ipsam restituendam tenetur, vel ejus pretium, si forte incendio, ruina, naufragio, aut latronum vel hostium incursu, consumpta fuerit, vel deperdita, subtracta vel ablata. Et qui rem utendam accepit, non sufficit ad rei custodiam, quod talem diligentiam adhibeat, qualem suis rebus propriis adhibere solet, si alius eam diligentius potuit custodire; ad vim autem majorem, vel casus fortuitos non tenetur quis, nisi culpa sua intervenerit. Ut si rem sibi commodatam domi, secum detulerit cum peregre profectus fuerit, et illam incursu hostium vel prædonum, vel naufragio amiserit non est dubium quin ad rei restitutionem teneatur. I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse. Bracton says, the bailee must use the utmost care, but yet he shall not be chargeable, where there is such a force as he cannot resist.

As to the third sort of bailment, *scilicet locatio* or lending for hire, in this case the bailee is also bound to take the utmost care, and to return the goods when the time of the hiring is expired. And here again I must recur to my old author, fol. 62, b. Qui pro usu vestimentorum auri vel argenti, vel alterius ornamenti, vel jumenti, mercedem dederit vel promiserit, talis ab eo desideratur custodia, qualem diligentissimus paterfamilias suis rebus adhibet, quam si præstiterit, et rem aliquo casu amiserit, ad rem restituendam non tenebitur. Nec sufficit aliquem talem diligentiam adhibere, qualem suis rebus propriis adhiberet, nisi talem adhibuerit, de qua superius dictum est. From whence it appears that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the bailee shall not be answerable in this case, if the goods are stolen.

As to the fourth sort of bailment, viz. *vadium* or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge, and secondly for what neglects he shall make satisfaction. As to the first, he has a special property, for the pawn is a

securing to the pawnee that he shall be repaid his debt, and to compel the pawnor to pay him. But if the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, &c.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them. But then she must do it at her peril, for whereas if she keeps them locked up in her cabinet, if her cabinet should be broke open and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is Ow. 123. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c., then the pawnee may use the horse in a reasonable manner, or milk the cow, &c., in recompense for the meat. As to the second point, Bracton, 99, b, gives you the answer. Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit, et rem casu amiserit, securus esse possit, nec impedietur creditum petere. In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 Ass. 28, and Southcote's Case is. But indeed the reason given in Southcote's Case is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the book of Assize, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong must be answerable for them at all events, for the detaining of them by him is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

As to the fifth sort of bailment, viz. a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, &c., which case of a master of a ship was first adjudged 26 Car. 2, in the case of Mors *v.* Slew. Raym. 220. 1 Vent. 190, 238. The law charges this person, thus intrusted to carry goods,

against all events but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailies, factors, and such like. And though a bailie is to have a reward for his management, yet he is only to do the best he can. And if he be robbed, &c., it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, &c. And yet if he receives his master's money, and keeps it locked up with a reasonable care, he shall not be answerable for it, though it be stolen. But yet this servant is not a domestic servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, farther than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then, the bailee having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib. 3, 100, it is called *mandatum*. It is an obligation which arises *ex mandato*. It is what we call in English an acting by commission. And if a man acts by commission for another gratis, and in the executing his commission behaves himself negligently, he is answerable. Vinnius, in his commentaries upon Justinian, lib. 3, tit. 27, 684, defines *mandatum* to be contractus quo aliquid gratuito gerendum committitur et accipitur. This undertaking obliges the undertaker to a diligent management. Bracton, *ubi supra*, says, contrahitur etiam obligatio non solum scripto et verbis, sed et consensu, sicut in contractibus bonæ fidei; ut in emptionibus, venditionibus, locationibus, conductionibus, societatibus, et mandatis. I don't find this word in any other author of our law, besides in this place in Bracton, which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

The reasons are, first, because in such a case a neglect is a deceit to the bailor. For when he intrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action. 1 Roll. Abr. 10. 2 Hen. 7, 11, a strong case to this matter. There the case was an action against a man, who had undertaken to keep an hundred sheep, for letting them be drowned by his default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; inasmuch as he has taken and executed his bargain, and has them in his custody, if after he does not look to them, an action lies. For here is his own act, viz. his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

But secondly it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management. Indeed, if the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing. The 19 Hen. 6, 49, and the other cases cited by my brothers, show that this is the difference. But in the 11 Hen. 4, 33, this difference is clearly put, and that is the only case concerning this matter which has not been cited by my brothers. There the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the court, what if he had built the house unskilfully, and it is agreed in that case an action would have lain. There has been a question made, if I deliver goods to A., and in consideration thereof he promise to redeliver them, if an action will lie for not redelivering them; and in Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards reversed, and according to that reversal, there was judgment afterwards entered for the defendant in the like case. Yelv. 128. But those cases were grumbled at, and the reversal of that judgment in Yelv. 4, was said by the judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in 2 Cro. 667, Tr. 21 Jac. 1, in the king's bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted

with another man's goods, must be taken to be a sufficient consideration, if the bailee once enter upon the trust and take the goods into his possession. The declaration in the case of Mors *v.* Slew was drawn by the greatest drawer in England in that time, and in that declaration, as it was always in all such cases, it was thought most prudent to put in that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence that the law should be settled in this point, but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. And judgment was given for the plaintiff.[1]

DALE *v.* HALL.

King's Bench, 1750.

[1 *Wilson*, 281.]

Action upon the case against a shipmaster or keelman who carries goods for hire from port to port; the plaintiff does not declare against him as a common carrier upon the custom of the realm, but the declaration is that the defendant at the special instance of the plaintiff undertook to carry certain goods consisting of knives and other hardware safe from such a port to such a port, and that in consideration thereof the plaintiff undertook and promised to pay him so much money, that the goods were delivered to the defendant on board his keel, and that the goods were kept so negligently by him that they were spoiled, to the plaintiff's damage.

For the defendant it was insisted at the trial, that as the plaintiff had proved no particular negligence in the defendant, that he might be permitted to give in evidence that he had taken all possible care of the goods, that the rats made a leak in the keel or hoy, whereby the goods were spoiled by the water coming in, that they pumped and did all they could to prevent the goods being damaged; which evidence the Judge permitted to be given, and thereupon left it to the jury, who found a verdict for the defendant.

Defendant argued that the breach assigned being that by the negli-

[1] See Jones, Bailments, 104 [1781]. "A carrier is regularly answerable for neglect, but not regularly for damage occasioned by the attacks of ruffians, any more than for hostile violence or unavoidable misfortune; but the great maxims of policy and good government make it necessary to except from this rule the case of robbery, lest confederacies should be formed between carriers and desperate villains, with little or no chance of detection. Although the Act of God, which the ancients too called Θεοῦ βίαν and *Vim divinam*, be an expression which long habit has rendered familiar to us, yet perhaps on that very account it might be more proper, as well as more decent, to substitute in its place inevitable accident. . . . Law, which is merely a practical science, cannot use terms too popular and perspicuous."— Ed.

gence of the defaulter the goods were spoiled, therefore negligence is the very gist of this action, and the defendant has proved there was no negligence.

Lee, C. J. The declaration is, that the defendant undertook for hire to carry and deliver the goods safe, and the breach assigned is that they were damaged by negligence; this is no more than what the law says. Everything is a negligence in a carrier or hoyman that the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, unless they happen to be damaged by the act of God, or the king's enemies; and a promise to carry safely is a promise to keep safely.

Wright, J., of the same opinion.

Denison, J. The law is very clear in this case for the plaintiff; the declaration upon the custom of the realm is the same in effect with the present declaration. . . .

Foster, J., of the same opinion; and a new trial was granted.[1]

FORWARD *v.* PITTARD.

King's Bench, 1785.

[1 *Term Reports*, 27.]

This was an action on the case against the defendant as a common carrier, for not safely carrying and delivering the plaintiff's goods. This action was tried at the last summer assizes at Dorchester, before Mr. Baron Perryn, when the jury found a verdict for the plaintiff, subject to the opinion of the Court on the following case: —

"That the defendant was a common carrier from London to Shaftsbury. That on Thursday the 14th of October, 1784, the plaintiff delivered to him on Weyhill 12 pockets of hops to be carried by him to Andover, and to be by him forwarded to Shaftsbury by his public road waggon, which travels from London through Andover to Shaftsbury. That by the course of travelling, such waggon was not to leave Andover till the Saturday evening following. That in the night of the following day after the delivery of the hops, a fire broke out in a booth at the distance of 100 yards from the booth in which the defendant had deposited the hops, which burnt for some time with unextinguishable violence, and during that time communicated itself to the said booth in which the defendant had deposited the hops, and entirely consumed them without any actual negligence in the defendant. That the fire was not occasioned by lightning."

N. Bond, for the plaintiff. The question is, whether a carrier is

[1] Of this case Sir William Jones says (Bailments, p. 105): "The true reason of this decision is not mentioned by the reporter: it was in fact at least ordinary negligence to let a rat do such mischief in the vessel; and the Roman law has on this principle decided that 'si fullo vestimenta polienda acceperit eaque mures roserint, ex locato tenetur, quia debuit ab hac re cavere.'" — Ed.

liable for the loss of goods occasioned by fire, without any negligence in him or his servants. The general proposition is, that a carrier is liable in all cases, except the loss be occasioned by the act of God, or the King's enemies. (Lord Raymond, 909. 1 Wils. 281.) And this doctrine has lately been recognized by this Court, in the case of the Company of the Trent Navigation *v.* Wood. (East. 25 Geo. 3. B. R.) The only doubt is on the construction of the words, "the act of God." It is an effect immediately produced without the interposition of any human cause. In Amies and Stephens (1 Stra. 128) these words were held to include the case of a ship being lost by tempest. In the books, under the head of "waste," there is an analogous distinction to be found: if a house fall down by tempest, or be burned by lightning, it is no waste; but burning by negligence or mischance is waste. (Co. Litt. 53. a. b.) Before the 6th of Anne (6 Ann. c. 31; 10 Ann. c. 14) an action lay against any person in whose house a fire accidentally began: this shows that an accidental fire was not in law considered as the act of God; but the person was punishable for negligence. Suppose a fire happens in a house where there are different lodgers, each of whose lodgings is considered as a separate house: if the fire be communicated from one lodging to another, and the Court say the first fire was the act of man, at what time will it be said that it ceases to be the act of man and commences to be the act of God? if it were not the act of man in the first house, it is impossible to draw the line. In the case of the Company of the Trent Navigation and Wood, Lord MANSFIELD said, "By the act of God is meant a natural, not merely an inevitable, accident."

If it be contended for the defendant that it is here stated that there was no actual negligence, that will not serve him; for this action was not founded in negligence. Lord HOLT says, there are several species of bailments, and different degrees of liability annexed to each: and a carrier is that kind of bailee, who is answerable though there be no actual negligence.

Borough, for the defendant, observed that the point in this case was not before the Court in any of the cases cited. The general question here is, whether a carrier is compellable to make satisfaction for goods delivered to him to carry, and destroyed by mere accident, in a case where negligence is so far from being imputed to him, that it is expressly negatived? This action of assumpsit must be considered as an action founded on what is called the custom of the realm relating to carriers. And from a review of all the cases on this subject it manifestly appears that a carrier is only liable for damage and loss occasioned by the acts or negligence of himself and servants, that is, for such damage and loss only as human care or foresight can prevent; and that there is no implied contract between him and his employers to indemnify them against unavoidable accidents. The law with respect to land carriers and water carriers is the same. Rich *v.* Kneeland, Cro. Jac. 330. Hob. 17. 5 Burr. 2827.

In Vid. 27. The declaration, in an action against a waterman for

negligently keeping his goods, states the custom relative to carriers thus, "absque substractione, amissione, seu spoliatione, portare tenentur, ita quod pro defectu dictorum communium portatorum seu servientium suorum, hujusmodi bona et catalla eis sic ut prefertur deliberata, non sint perdita, amissa, seu spoliata." It then states the breach, that the defendant had not delivered them, and "pro defectu bonæ custodiæ ipsius defendentis et servientium suorum perdita et amissa fuerunt." In Brownl. Red. 12. the breach in a declaration against a carrier is, "defendens tam negligenter et improvidè custodivit et carriavit," etc. In Clift. 38, 39. Mod. Intr. 91, 92. and Herne 76. the entries are to the same effect. In Rich and Kneeland (Hob. 17), the custom is stated in a similar way: and in the Exchequer Chamber it was resolved, "that though it was laid as a custom of the realm, yet indeed it is common law." On considering these cases, it is not true that "the act of God, and of the King's enemies," is an exception from the law. For an exception is always of something comprehended within the rule, and therefore excepted out of it: but the act of God and of the King's enemies is not within the law as laid down in the books cited.

All the authorities cited by the counsel for the plaintiff are founded on the dictum in Coggs *v.* Bernard (2 Lord Raymond, 909), where this doctrine was first laid down: but Lord Holt did not mean to state the proposition in the sense in which it has been contended he did state it. He did not intend to say that cases falling within the reason of what are vulgarly called "acts of God," should not also be good defences for a carrier. After saying (Lord Raymond, 918), "the law charges the persons, thus intrusted to carry goods, against all events, but the acts of God and of the enemies of the King," he proceeds thus, "for though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons who had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner, as would not be possible to be discovered." As Lord Holt therefore states the responsibility of carriers in case of robbery to take its origin from a ground of policy, he could not mean to say that a carrier was also liable in cases of accidents, where neither combination or negligence can possibly exist.

It appears from the Doctor and Student (Dial. 2. c. 38. p. 270) that, at the time that book was written, the carrier was held liable for robberies which diligence and foresight might prevent. And what is there said agrees precisely with the custom; and does not bear hard on the carrier. If he will travel by night, and is robbed, he has no remedy against the hundred; for then he is not protected by the statute of Winton, and he ought to be answerable to the employer. If he travel by day and is robbed he has a remedy. Now the carrier may not perhaps be worth suing; and the employer may bring the action against

the hundred in his own name; which action he would be deprived of, if the carrier travelled by night.

There is not a single authority in all the old books which says that a carrier is responsible for mere accidents. He only engages against substraction, spoil, and loss, occasioned by the neglect of himself or his servants. These words plainly point at acts to be done, and omission of care and diligence. But in the present case there is no act done; and there cannot be said to be any omission of care and diligence, since they could not have prevented the calamity.

Lord HOLT, in Coggs *v.* Bernard, seems to have traced, with great attention, the different species of bailments. He cites many passages from Bracton, who has nearly copied them from Justinian. So that it is probable that the custom relating to carriers took its origin from the civil law as to bailments. Now it is observable that in no one case of bailment is the bailee answerable for an accident: he is only liable for want of diligence. The only difference in this respect between the civil and the English law is, that the former (Justin. lib. 3. 15. S. 2, 3, 4. Tit. 35. S. 5) distinguishes between the different degrees of diligence required in the different species of bailment; which the latter does not.

In all the cases to be found in our books, may be traced the true ground of liability, negligence. If the law were not as is now contended for, the question of negligence could never have arisen; and the case of robbery could not have borne any argument; whereas the case of Mors *v.* Slue (1 Vent. 190. 238) came on repeatedly before the Court, and created very considerable doubts.

In the case of Dale *v.* Hall (1 Wils. 281), and the proprietors of the Trent Navigation *v.* Wood, there were clear facts of negligence. In the first, the rats gnawed a hole in the boy, which undoubtedly might have been prevented. And in the other, each of the judges, in giving his opinion, said there was negligence.

In the year books (22 Ass. 41) there is a case of an action against a waterman for overloading his boat so that the plaintiff's horse was drowned. This case is recognized in Williams *v.* Lloyd (W. Jones, 180), where it is said "it was there agreed that if he had not surcharged the boat, although the horse was drowned, no action lies, notwithstanding the assumpsit: but if he surcharge the boat, otherwise; for there is default and negligence in the party." The Court in 22 Ass. 41, said, "it seems that you trespassed when you surcharged the boat, by which the horse perished." The same case is to be found in 1 Ro. Abr. 10. pl. 18. Bro. Tit. Action sur le Case, 78. And it is also recognized in Williams *v.* Hide and Ux. Palm. 548.

In Winch. 26. To an action against a carrier, there is a special plea that the inn in which the goods were deposited was burned by fire, and that the plaintiff's goods were at the same time destroyed, without the default or neglect of the defendant or his servants. To this the plaintiff demurred, not generally but specially, "that the plea amounted to the general issue."

In all actions founded in negligence, the negligence is alleged and tried, as a fact; as in actions against a farrier, smith, coachman, etc. It is the constant course in such actions to leave the question of negligence to the jury. It appears in Dalston *v.* Janson (5 Mod. 90) that the defendant formerly used to plead particularly to the neglect. In 43 Edw. 3. 33. Clerk's Assist. 99. Mod. Intr. 95. and Brown. Red. 101. which were actions founded in negligence, the negligence is traversed. Now a traverse can be only of matter of fact. And here negligence is expressly negatived by the case.

However, if the Court should be of opinion that the carrier is answerable for every loss, unless occasioned by the act of God, or the King's enemies, he then contended that, as the act of God was a good ground of defence, this accident though not within the words, was within the reason, of that ground. It cannot be said that misfortunes occasioned by lightning, rain, wind, etc., are the immediate acts of the Almighty; they are permitted but not directed by him. The reason why these accidents are not held to charge a carrier is that they are not under the control of the contracting party; and therefore cannot affect the contract, inasmuch as he engages only against those events which by possibility he may prevent. Lord Bacon, in his Law Tracts, commenting on this maxim, Reg. 5. "necessitas inducit privilegium quoad jura privata," says, "the law charges no man with default where the act is compulsory and not voluntary, and where there is not a consent and election; therefore, if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason, as in presumption of law man's nature cannot overcome, such necessity carrieth a privilege in itself." Necessity, he says, is of three sorts; and under the third he adds, "If a fire be taken in a street, I may justify pulling down the walls or house of another man to save the row from the spreading of the fire." Now in the present case, if any person, in order to stop the progress of the flames, had insisted on pulling down the booth wherein the hops were deposited, and in doing this the hops had been damaged, the carrier would not have been liable to make good such damage; for it would have been unlawful for him to have prevented the pulling down the booth.

It is expressly found in the present case that the fire burnt with unextinguishable violence. The breaking out of the fire was an event which God only could foresee. And the course it would take was as little to be discovered by human penetration.

Bond, in reply. There are several strong cases where there could not be any negligence. It is not sufficient in these cases to negative any negligence; for every thing is negligence which the law does not excuse (1 Wils. 282). And the question here is, is this a case which the law does excuse? In Goffe *v.* Clinkard (cited in Wils. 282.) there was all possible care on the part of the defendants. The judgment in the case of (4 Burr. 2298) Gibbon *v.* Peyton and another, which was an action against a stage-coachman for not delivering money sent, is extremely strong; there Lord MANSFIELD said (4 Burr. 2300), "a common

carrier, in respect of the premium he is to receive, runs the risk of them, and must make good the loss, though it happen without any fault in him; the reward making him answerable for their safe delivery."

That a carrier was liable in the case of a robbery was first held in 9 Ed. 4. pl. 40.

A bailee only engages to take care of his goods as his own, and is not answerable for a robbery; but a carrier insures. 1 Ventr. 190, 238. Sir T. Raym. 220. S. C. 1 Mod. 85.

In Barclay and Heygena (E. 24 G. 3. B. R.), which was an action against a master of a ship to recover the value of some goods put on board his ship in order to be carried to St. Sebastian; it was proved that an irresistible force broke into the ship in the river Thames, and stole the goods; yet the defendant was held answerable. In Sutton and Mitchel (at the sittings at Guildhall after Tr. 25 G. 3. *Vide* 1 T. R. 18), the question was not disputed as far as to the value of the ship and freight.

There is no distinction between that case and a land carrier. And there can be no hardship in the Court's determining in favour of the plaintiff; for when the law is once known and established, the parties may contract according to the terms which it prescribes.

As to negligence being a matter of fact; that is answered by the decision in the Company of the Trent Navigation against Wood.

Lord MANSFIELD. There is a nicety of distinction between the act of God and inevitable necessity. In these cases actual negligence is not necessary to support the action. Cur. adv. vult.

Afterwards Lord MANSFIELD delivered the unanimous opinion of the Court.

After stating the case — The question is, whether the common carrier is liable in this case of fire? It appears from all the cases for one hundred years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract, he is liable for all due care and diligence; and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies. Now what is the act of God? I consider it to mean something in opposition to the act of man: for every thing is the act of God that happens by his permission; every thing, by his knowledge. But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the King's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests.

If an armed force come to rob the carrier of the goods, he is liable: and a reason is given in the books, which is a bad one, viz. that he ought to have a sufficient force to repel it: but that would be impossible in some cases, as for instance in the riots in the year 1780. The true

reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil.

In this case, it does not appear but that the fire arose from the act of some man or other. It certainly did arise from some act of man; for it is expressly stated not to have happened by lightning. The carrier therefore in this case is liable, inasmuch as he is liable for inevitable accident.

Judgment for the plaintiff.

CHAPTER I.

PUBLIC DUTY OF CARRIERS.

Section I. Public Calling.

Y. B. 21 Hen. VI. 55, pl. 12 (1443). Paston, J. If I am riding along the highway and come to a town in which a smith lives, who has material enough to shoe my horse; if my horse has lost his shoes, and I at a fit time request him to shoe the horse and offer him enough for his labor, and he refuses, whereby my horse is afterwards lost for want of shoes, I say that in this same case I shall have action of trespass on the case on his default.

Y. B. 39 Hen. VI. 18, pl. 24 (1460). Moile, J., said, If I come to an innkeeper to lodge with him, and he will not lodge me, I shall have on my case an action of trespass against him; and in the same way if I come to a victualler to buy victual, and he will not sell, I shall have an action of trespass on my case against him; and still in such cases if he will bring a writ of debt against me on such duty, I shall have my law.

Prisot, C. J. It is true in those cases that the defendant wages his law; but the victualler or innkeeper is not held to sell you his victual except at his will, nor the innkeeper to lodge you against his will, but it lies in their election.

Quod nota; quære de ceo.

Danby, J., said that an innkeeper is not bound to give bread to his guest's horse until he be paid in cash; for the law does not compel him to put trust in his guest for payment.

Y. B. 22 Ed. IV. 49, pl. 15 (1483). Brian, J. I know well, if I put a robe with a tailor to be made, or if I come to a common inn or a common smith with my horse, in all cases of the sort I may have my robe lying in the tailor's shop as long as I please [without its being subject to distraint]; for he is compelled by the law to do it, and he may by the law detain until he be satisfied for making it. In the same way my horse shall be in the common inn for whatever time I please, for the license is given by the law, and the innkeeper may retain until he be paid. . . . But where the law gives license for a time certain, there it is otherwise; as if a man continues in a tavern beyond the proper hour, there all his coming shall be tortious, for the law will not have common taverns haunted except in due time and season.

Y. B. 10 Hen. VII. 8, pl. 14 (1494). Hussey, C. J., said that a victualler shall be compelled to sell his victual if the vendee has tendered him ready payment, otherwise not. *Quod* Brian, C. J., *affirmavit.*

Y. B. 14 Hen. VII. 22, pl. 4 (1499). *Higham* (*arguendo*). If I come to an innkeeper and pray to be lodged with him, and he says that at that time he will not, but if I come at another time he will with pleasure, I shall have an action on my case, because it was his duty to lodge me, and by the law he was bound to do it.

Keilway 50 pl. 4 (1503). Note that it was agreed by the Court, that where a smith declines to shoe my horse, or an innkeeper refuses to give me entertainment at his inn, I shall have an action on the case, notwithstanding no act is done;[1] for it does not sound in covenant. . . . Note that in this case a man shall have no action against innkeeper, but shall make complaint to the ruler, by 5 Ed. IV. 2; *contra*, 14 Hen. VII. 22.

JACKSON *v.* ROGERS.

King's Bench, 1683.

[2 *Shower*, 327.]

Action on the case, for that whereas the defendant is a common carrier from London to Lymmington *et abinde retrorsum*, and setting it forth as the custom of England, that he is bound to carry goods, and that the plaintiff brought him such a pack, he refused to carry them, though offered his hire.

And held by Jefferies, C. J., that the action is maintainable, as well as it is against an innkeeper for refusing a guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same.

Note, That it was alleged and proved that he had convenience to carry the same; and the plaintiff had a verdict.

ALLNUTT *v.* INGLIS.

King's Bench, 1810.

[12 *East*, 527.]

Lord Ellenborough, C. J.[2] The question on this record is whether the London Dock Company have a right to insist upon receiving wines into their warehouses for a hire and reward arbitrary and at their will and pleasure, or whether they were bound to receive them there for a reasonable reward only. There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property or the use of it: but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will

[1] "Because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the king's subjects that will employ him in the way of his trade." Holt, C. J., in Lane *v.* Cotton, 12 Mod. 484. — Ed.

[2] This opinion only is given; it sufficiently states the case. — Ed.

take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms. The question then is, whether circumstanced as this company is by the combination of the warehousing act with the act by which they were originally constituted, and with the actually existing state of things in the port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord HALE, obliged to limit themselves to a reasonable compensation for such warehousing? And according to him, wherever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf. Lord HALE puts the case either way; where the king or a subject have a public wharf to which all persons must come who come to that port to unlade their goods, either "because they are the wharfs only licensed by the queen, or because there is no other wharf in that port, as it may fall out: in that case (he says) there cannot be taken arbitrary and excessive duties for cranage, wharfage, &c.: neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter." And then he assigns this reason, "for now the wharf and crane and other conveniences are affected with a public interest, and they cease to be juris privati only." Then were the company's warehouses juris privati only at this time? The legislature had said that these goods should only be warehoused there; and the act was passed not merely for the benefit of the company, but for the good of trade. The first clause (43 G. 3, c. 132, the general warehousing act) says that it would greatly tend to the encouragement of the trade and commerce of G. B., and to the accommodation of merchants and others, if certain goods were permitted to be entered and landed and secured in the port of London without payment of duties at the time of the first entry: and then it says that it shall be lawful for the importer of certain goods enumerated in table A. to secure the same in the West India dock warehouses: and then by s. 2 other goods enumerated in table B. may in like manner be secured in the London dock warehouses. And there are no other places at present lawfully authorized for the warehousing of wines (such as were imported in this case) except these warehouses within the London dock premises, or such others as are in the hands of this company. But if those other warehouses were licensed in other hands, it would not cease to be a monopoly of the privilege of bonding there, if the right of the public were still narrowed and restricted to bond their goods in those particular warehouses, though they might be in the hands of one or two others besides the company's. Here then the company's warehouses were invested with the monopoly of a public privilege, and therefore they must by law confine themselves to take reasonable rates for the use of them for that purpose. If the crown should hereafter think it advisable to extend the privilege more generally to other persons and places, so far as that

the public will not be restrained from exercising a choice of warehouses for the purpose, the company may be enfranchised from the restriction which attaches upon a monopoly: but at present, while the public are so restricted to warehouse their goods with them for the purpose of bonding, they must submit to that restriction; and it is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord HALE in the passage referred to, which includes the good sense as well as the law of the subject. Whether the company be bound to continue to apply their warehouses to this purpose may be a nice question, and I will not say to what extent it may go; but as long as their warehouses are the only places which can be resorted to for this purpose, they are bound to let the trade have the use of them for a reasonable hire and reward.[1]

LAWRENCE *v.* PULLMAN PALACE CAR CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1887.

[144 *Mass.* 1.]

DEVENS, J.[2] The gist of the plaintiff's claim is that he was wrongfully refused accommodation in the sleeping car of the defendant, in coming from Baltimore to New York, by the defendant's servants; and that, on declining to leave the car, he was ejected therefrom. His argument assumes that it was for the defendant to determine under what circumstances a passenger should be allowed to purchase a berth, and, incidentally, the other accommodations afforded by the sleeping car. An examination of the contract with the Pennsylvania Railroad Company, by virtue of which the cars owned by the defendant were conveyed over its railroad, shows that, while these cars were to be furnished by the defendant corporation, they were so furnished to be used by the railroad company "for the transportation of passengers;" that its employees were to be governed by the rules and regulations of the railroad company, such as it might adopt, from time to time, for the government of its own employees. While, therefore, the defendant company was to collect the fares for the accommodations furnished by its cars, keep them in proper order, and attend upon the passengers, it was for the railroad company to determine who should be entitled to enjoy the accommodations of these cars, and by what regulation this use of the cars should be governed. The defendant company could not certainly furnish a berth in its cars until the person requesting it had become entitled to transportation by the railroad company as a passenger, and he must also be entitled to the transportation for such routes, distances, or under such circumstances, as the railroad company

[1] GROSE, LE BLANC, and BAYLEY, JJ., delivered concurring opinions. — ED.

[2] The opinion only is given; it sufficiently states the case. — ED.

should determine to be those under which the defendant company would be authorized to furnish him with its accommodations. The defendant company could only contract with a passenger when he was of such a class that the railroad company permitted the contract to be made.

The railroad company had classified its trains, fixing the terms upon which persons should become entitled to transportation in the sleeping cars, and the cars in which such transportation would be afforded. It was its regulation that, between Baltimore and New York this accommodation should only be furnished to those holding a ticket over the whole route. It does not appear that this was an unreasonable rule, but, whether it was so or not, it was the regulation of the railroad company, and not of the defendant. The evidence was, "that the ordinary train conductors of the Pennsylvania Railroad Company have full and entire authority over the porters and conductors of the Pullman cars, in regard to the matter of determining who shall ride in the cars, and under what circumstances, and in regard to every other thing, except" the details of care, etc. The defendant's servant, the plaintiff having entered the sleeping car, informed him that his "split tickets," as they are termed, were not such as would entitle him to purchase a berth, and that he could sell only to those holding "through passage tickets, intact, to the point to which sleeping accommodations were desired." The plaintiff was in no way disturbed until the train conductor (who was not the defendant's servant) came into the car, informed the plaintiff that his tickets were not such as to entitle him to purchase the sleeping-car ticket, and several times urged the plaintiff to leave the sleeping car, which the plaintiff refused to do. Whether accommodation was rightly refused to the plaintiff or not in the sleeping car, the refusal was the act of the railroad company's servant, and not of the defendant's, whose duty it was to be guided by the train conductor.

The ejection of the plaintiff was also the act of the railroad company, and not of the defendant. It is the contention of the plaintiff that, even if he might be ejected from the car, it was done in an improper manner. The plaintiff testified that he was waiting for a "show of force," after his repeated refusals to leave the car. This exhibition of force was made by the train conductor, who put his hand upon him, when the plaintiff rose and yielded thereto. The defendant's conductor took hold of the plaintiff's arm when he rose, and aided the plaintiff in crossing the platform of the cars, but the evidence does not show that he used or exercised any force whatever. Even if he had used force upon the plaintiff, he was not doing the business of the defendant company; he was assisting the train conductor in the duty he was performing as servant of the railroad company. To conduct him across from one car to another in the manner described by the plaintiff himself, after he had repeatedly refused to leave the car, affords no evidence of any removal in an improper manner. The act of the defendant's servant was in every way calculated to assist the plaintiff in his transit from one car to another.

Nor is the fact important that the car into which the plaintiff was

passed subsequently became cold, even if it were possible to hold the defendant responsible for the act of its servant. So far as appears by the evidence, there is no reason to believe that, when the plaintiff entered the car, it was not in fit condition to receive passengers; and, by the contract, the management of it and the duty of furnishing fuel were entirely with the railroad company, and not with the defendant.

Judgment on the verdict.[1]

CHESAPEAKE AND POTOMAC TELEPHONE CO. *v.* BALTIMORE AND OHIO TELEGRAPH CO.

COURT OF APPEALS, MARYLAND, 1887.

[66 *Maryland*, 399.]

ALVEY, C. J.[2] This was an application by the appellee, a telegraph company, to the Court below for a mandamus, which was accordingly ordered, against the appellant, another telegraph company, but doing a general telephone business.

The appellant appears to be an auxiliary company, operating the Telephone Exchange under the patents known as the Bell patents. Those patents, formerly held by the National Bell Telephone Company, are now held by the American Bell Telephone Company, a corporation created under the law of the State of Massachusetts. The patents, with the contracts relating thereto, were assigned by the former to the latter company, prior to the 23rd of May, 1882, and it is under a contract, of the date just mentioned, that the appellant acquired a right to use the patented devices in the operation of its system of telephonic exchanges.

In the agreed statement of facts, it is admitted that all the telephones used by the Chesapeake and Potomac Telephone Company (a company to which the appellant is an auxiliary organization), and also all the telephones used by the appellant in its Exchange in the City of Baltimore, and elsewhere in the State, are the property of the American Bell Telephone Company. It is alleged by the appellee and admitted by the appellant, that the offices of the Western Union Telegraph Company of Baltimore City are connected with the Telephone Exchange of the appellant, and that when a subscriber to the Telephone Exchange wishes to send a message by way of the lines of the Western Union Telegraph Company, the subscriber calls up the Telephone Exchange, and the agent there connects him with the office of the Western Union Telegraph Company, and the subscriber thereupon telephones his message over the lines of the appellant, to the Western Union Telegraph office; and a like process is repeated when a message is received by the Western Union Telegraph Company for a subscriber to the Telephone Exchange of the appellant. The appellee is a com-

[1] See Nevin *v.* P. P. Car Co., 106 Ill. 222; Searles *v.* Car Co., 45 Fed. 330. — ED.

[2] Part of the opinion only is given. — ED.

peting company, in the general telegraph business, with the Western Union Telegraph Company. And being such, it made application to the appellant to have a telephone instrument placed in its receiving room in Baltimore, and that the same might be connected with the Central Exchange of the appellant in that city; so that the appellee might be placed upon the same and equal footing with the Western Union Telegraph Company, in conducting its business. This request was refused, unless the connection be accepted under certain conditions and restrictions, to be specially embodied in a contract between the two companies, and which conditions and restrictions do not apply in the case of the Western Union Telegraph Company.

It appears that there were conflicting claims existing as to priority of invention, and alleged infringement of patent rights, which were involved in a controversy between the Western Union Telegraph Company and others, and the National Bell Telephone Company, to whose rights the American Bell Telephone Company succeeded; and in order to adjust those conflicting pretensions, the contract of the 10th of Nov., 1879, was entered into by the several parties concerned. The contract is very elaborate, and contains a great variety of provisions. By this agreement, with certain exceptions, the National Bell Telephone Company was to acquire and become owner of all the patents relating to telephones, or patents for the transmission of articulate speech by means of electricity. But while it was expressly stipulated (Art. 13, cl. 1) that the right to connect district or exchange systems, and the right to use telephones on all lines, should remain exclusively with the National Bell Telephone Company (subsequently the American Bell Telephone Company), and those licensed by it for the purpose, it was in terms provided that "such connecting and other lines are not to be used for the transmission of general business messages, market quotations, or news, for sale or publication, *in competition with the business* of the Western Union Telegraph Company, or with that of the Gold and Stock Telegraph Company. And the party of the second part [National Bell Teleph. Co.], *so far as it lawfully and properly can prevent it, will not permit* the transmission of such general business messages, market quotations, or news, for sale or publication, over lines owned by it, or by corporations in which it owns a controlling interest, nor license the use of its telephones, or patents, for the transmission of such general business messages, market quotations, or news, for sale or publication, *in competition with such telegraph business* of the Western Union Telegraph Company, or that of the Gold and Stock Telegraph Company." The contract of the 23rd of May, 1882, under which the appellant derives its right to the use of the patented instruments, was made in subordination to the prior contract of the 10th of Nov., 1879, and contains a provision to conform to the restrictions and conditions just quoted. In that subordinate contract it is provided that "no telegraph company, unless specially permitted by the licensor, can be a subscriber, or use the system to collect and deliver messages from and to its customers," &c.

These contracts are pleaded and relied on by the appellant as affording a full justification for exacting from the appellee a condition in the contract of subscription to the Exchange, that the latter should observe the restrictions in favor of the Western Union Telegraph Company. The appellant contends that these restrictive conditions in the contracts recited are binding upon it, and that it is not at liberty to furnish to the appellant, being a telegraph company, the instruments applied for and place them in connection with the Exchange, unless it be subject to the restrictive conditions prescribed. And if this be so, the Court below was in error in ordering the mandamus to issue. But is the contention of the appellant well founded, in view of the nature of the service that it has undertaken to perform?

The appellant is in the exercise of a public employment, and has assumed the duty of serving the public while in that employment. In this case, the appellant is an incorporated body, but it makes no difference whether the party owning and operating a telegraph line or a telephone exchange be a corporation or an individual, the duty imposed, in respect to the public, is the same. It is the nature of the service undertaken to be performed that creates the duty to the public, and in which the public have an interest, and not simply the body that may be invested with power. The telegraph and telephone are important instruments of commerce, and their service as such has become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge, than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public. They may make and establish all reasonable and proper rules and regulations for the government of their offices and those who deal with them, but they have no power to discriminate; and while offering ready to serve some, refuse to serve others. The law requires them to be impartial, and to serve all alike, upon compliance with their reasonable rules and regulations. This the statute expressly requires in respect to telegraph lines, and, as we have seen, the same provision is made applicable to telephone lines and exchanges. The law declares that it shall be the duty of any person or corporation owning and operating any telegraph line within this State (which, as we have seen, includes a telephone exchange) "to receive dispatches from and for any telegraph lines, associations, or companies, and from and for any individual," and to transmit the same in the manner established by the rules and regulations of the office, "and in the order in which they are received, with impartiality and good faith." And such being the plain duty of those owning or operating telegraph lines, or telephone lines and exchanges, within this State, they cannot be exonerated from the performance of that duty, by any conditions or restrictions imposed by contract with the owner of the invention applied in the exercise of the employment. The duty prescribed by law is paramount to that prescribed by contract.

Nor can it be any longer controverted that the Legislature of the

State has full power to regulate and control, within reasonable limits at least, public employments and property used in connection therewith. As we have said, the telegraph and telephone both being instruments in constant use in conducting the commerce, and the affairs, both public and private, of the country, their operation, therefore, in doing a general business, is a public employment, and the instruments and appliances used are property devoted to public use, and in which the public have an interest. And such being the case, the owner of the property thus devoted to public use, must submit to have that use and employment regulated by public authority for the common good. This is the principle settled by the case of *Munn vs. Illinois*, 94 U. S., 113, and which has been followed by subsequent cases. In the recent case of *Hockett vs. State*, 105 Ind., 250, where the cases upon this subject are largely collected, it was held, applying the principle of *Munn vs. Illinois*, that it was competent to the State to limit the price which telephone companies might charge for their patented facilities afforded to their customers. And if the price of the service can be lawfully regulated by State authority, there is no perceptible reason for denying such authority for the regulation of the service as to the parties to whom facilities should be furnished.[1]

PEOPLE *v.* BUDD.

COURT OF APPEALS, NEW YORK, 1889.

[117 *N. Y.* 1: 22 *N. E.* 670.]

ANDREWS, J.[2] The main question upon this record is whether the legislation fixing the maximum charge for elevating grain, contained in the act (chapter 581, Laws 1888), is valid and constitutional. The act, in its first section, fixes the maximum charge for receiving, weighing, and discharging grain by means of floating and stationary elevators and warehouses in this state at five-eighths of one cent a bushel, and for trimming and shoveling to the leg of the elevator, in the process of handling grain by means of elevators, "lake vessels, or propellers, the ocean vessels or steamships, and canal boats," shall, the section declares, only be required to pay the actual cost. The second section makes a violation of the act a misdemeanor, punishable by fine of not less than $250. The third section gives a civil remedy to a party injured by a violation of the act. The fourth section excludes from the operation of the act any village, town, or city having less than 130,000 population. The defendant, the

[1] See to the same effect State *v.* Telephone Co., 23 Fed. 539; Delaware, &c. Tel. Co. *v.* State, 50 Fed. 677; Hockett *v.* State, 105 Ind. 250; Telephone Co. *v.* Bradbury, 106 Ind. 1; Telephone Co. *v.* Falley, 118 Ind. 194; 19 N. E. 604; Louisville Transfer Co. *v.* Tel. Co., 1 Ky. Law J. 144; State *v.* Tel. Co., 17 Neb. 126; State *v.* Tel. Co., 36 Oh. St. 296; Bell Tel. Co. *v.* Com. (Pa.), 3 Atl. 825; Tel. Co. *v.* Tel. Co., 61 Vt. 241, 17 Atl. 1071. But see Tel. Co. *v.* Tel. Co., 49 Conn. 352. — ED.

[2] Part of the opinion is omitted. — ED.

manager of a stationary elevator in the city of Buffalo, on the 19th day of September, 1888, exacted from the Lehigh Valley Transportation Company, for elevating, raising, and discharging a cargo of corn from a lake propeller at his elevator, the sum of one cent a bushel, and for shoveling to the leg of the elevator the carrier was charged and compelled to pay $4 for each thousand bushels. The shoveling of grain to the leg of an elevator at the port of Buffalo is now performed, pursuant to an arrangement made since the passage of the act of 1888, by a body of men known as the Shovelers' Union, who pay the elevator $1.75 a thousand bushels for the use of the steam-shovel, a part of the machinery connected with the elevator, operated by steam, and who for their services, and the expense of the steam-shovel, charge the carrier for each thousand bushels of grain shoveled the sum of $4. The defendant was indicted for a violation of the act of 1888. The indictment contains a single count, charging a violation of the first section in two particulars, viz., in exacting more than the statute rate for elevating the cargo, and exacting more than the actual cost for shoveling the grain to the leg of the elevator. . . .

The question is whether the power of the legislature to regulate charges for the use of property, and the rendition of services connected with it, depend in every case upon the circumstance that the owner of the property has a legal monopoly or privilege to use the property for the particular purpose, or has some special protection from the government, or some peculiar benefit in the prosecution of his business. Lord HALE, in the treatises De Portibus Maris and De Jure Maris, so largely quoted from in the opinions in the Munn Case,[1] used the language that when private property is "affected with a public interest it ceases to be *juris privati* only," in assigning the reason why ferries and public wharves should be under public regulation, and only reasonable tolls charged. The right to establish a ferry was a franchise, and no man could set up a ferry, although he owned the soil and landing places on both sides of the stream, without a charter from the king, or a prescription time out of mind. The franchise to establish ferries was a royal prerogative, and the grant of the king was necessary to authorize a subject to establish a public ferry, even on his own premises. When we recur to the origin and purpose of this prerogative, it will be seen that it was vested in the king as a means by which a business in which the whole community were interested could be regulated. In other words, it was simply one mode of exercising a prerogative of government — that is to say, through the sovereign instead of through Parliament — in a matter of public concern. This and similar prerogatives were vested in the king for public purposes, and not for his private advantage or emolument. Lord KENYON in Rorke *v.* Dayrell, 4 Term R. 410, said: "The prerogatives [of the crown] are not given for the

[1] Munn *v.* Illinois, 94 U. S. 113. — ED.

personal advantage of the king, but they are allowed to exist because they are beneficial to the subject;" and it is said in Chitty on Prerogatives (page 4): "The splendor, rights, and power of the crown were attached to it for the benefit of the people, and not for the private gratification of the subject." And Lord HALE, in one of the passages referred to, in stating the reason why a man may not set up a ferry without a charter from the king, says: "Because it doth in consequence tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll which is a common charge, and every ferry ought to be under a public regulation." The right to take tolls for wharfage in a public port was also a franchise, and tolls, as Lord HALE says, could not be taken without lawful title by charter or prescription. De Port. Mar. 77. But the king, if he maintained a public wharf, was under the same obligation as a subject to exact only reasonable tolls, nor could the king authorize unreasonable tolls to be taken by a subject. The language of Lord HALE is explicit upon both these points: "If the king or subject have a public wharf into which all persons that come to that port must come to unload their goods, as for the purpose, because they are the wharves only licensed by the queen, according to the statute of 1 Eliz. c. 11, or because there is no other wharf in that port, as it may fall out when a port is newly erected, in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, passage, etc. Neither can they be enhanced to an immoderate degree, but the duties must be reasonable and moderate, though settled by the king's license or charter."

The contention that the right to regulate the charges of ferrymen or wharfingers was founded on the fact that tolls could not be taken without the king's license does not seem to us to be sound. It rested on the broader basis of public interest, and the license was the method by which persons exercising these functions were subjected to governmental supervision. The king, in whom the franchise of wharfage was vested as a royal prerogative, was himself, as has been shown, subject to the same rule as the subject, and could only exact reasonable wharfage, nor could he by express license authorize the taking of more. The language of Lord HALE, that private property may be affected by a public interest, cannot justly, we think, be restricted as meaning only property clothed with a public character by special grant or charter of the sovereign. The control which by common law and by statute is exercised over common carriers is conclusive upon the point that the right of the legislature to regulate the charges for services in connection with the use of property does not in every case depend upon the question of legal monopoly. From the earliest period of the common law it has been held that common carriers were bound to carry for a reasonable compensation. They were not at liberty to charge whatever sum they pleased, and, even where the price of carriage was fixed by the contract or convention of the parties, the contract was not enforceable beyond the point

of reasonable compensation. From time to time statutes have been enacted in England and in this country fixing the sum which should be charged by carriers for the transportation of passengers and property, and the validity of such legislation has not been questioned. But the business of common carriers until recent times was conducted almost exclusively by individuals for private emolument, and was open to every one who chose to engage in it. The state conferred no franchise, and extended to common carriers no benefit or protection, except that general protection which the law affords to all persons and property within its jurisdiction. The extraordinary obligations imposed upon carriers, and the subjection of the business to public regulation, were based on the character of the business; or, in the language of Sir William Jones, upon the consideration "that the calling is a public employment." Jones, Bailm. App. It is only a public employment in the sense of the language of Lord HALE, that it was "affected with a public interest," and the imposition of the character of a public business upon the business of a common carrier was made because public policy was deemed to require that it should be under public regulation. The principle of the common law, that common carriers must serve the public for a reasonable compensation, became a part of the law of this state, and from the adoption of the constitution has been part of our municipal law. It is competent for the legislature to change the rule of reasonable compensation, as the matter was left by the common law, and prescribe a fixed and definite compensation for the services of common carriers. This principle was declared in the Munn Case, which was cited with approval on this point in Sawyer *v.* Davis, 136 Mass. 239. It accords with the language of Chief Justice SHAW in Com. *v.* Alger, 7 Cush. 53: "Wherever there is a general right on the part of the public, and a general duty on the part of a land-owner or any other person to respect such right, we think it is competent for the legislature, by a specific enactment, to prescribe a precise, practical rule for declaring, establishing, and securing such right, and enforcing respect for it." The practice of the legislature in this and other states to prescribe a maximum rate for the transportation of persons or property on railroads is justified upon this principle. Where the right of the legislature to regulate the fares or charges on railroads is received by the charter of incorporation, or the charter was granted subject to the general right of alteration or repeal by the legislature, the power of the legislature in such cases to prescribe the rate of compensation is a part of the contract, and the exercise of the power does not depend upon any general legislative authority to regulate the charges of common carriers. But the cases are uniform that where there is no reservation in the charter the legislature may nevertheless interfere, and prescribe or limit the charges of railroad corporations. The Granger Cases, 94 U. S. 113; Dow *v.* Beidelman, 125 U. S. 680; EARL, J., in People *v.* Railroad Co., 70 N. Y. 569; RUGER, C. J., in Railroad Co. *v.* Railroad Co., 111 N. Y. 132.

The power of regulation in these cases does not turn upon the fact that the entities affected by the legislation are corporations deriving their existence from the state, but upon the fact that the corporations are common carriers, and therefore subject to legislative control. The state, in constituting a corporation, may prescribe or limit its powers, and reserve such control as it sees fit, and the body accepting the charter takes it subject to such limitations and reservations, and is bound by them. The considerations upon which a corporation holds its franchise are the duties and obligations imposed by the act of incorporation. But when a corporation is created it has the same rights and the same duties, within the scope marked out for its action, that a natural person has. Its property is secured to it by the same constitutional guaranties, and in the management of its property and business is subject to regulation by the legislature to the same extent only as natural persons, except as the power may be extended by its charter. The mere fact of a corporate character does not extend the power of legislative regulation. For illustration, it could not justly be contended that the act of 1888 would be a valid exercise of legislative power as to corporations organized for the purpose of elevating grain, although invalid as to private persons conducting the same business. The conceded power of legislation over common carriers is adverse to the claim that the police power does not in any case include the power to fix the price of the use of private property, and of services connected with such use, unless there is a legal monopoly, or special governmental privileges or protection have been bestowed. It is said that the control which the legislature is permitted to exercise over the business of common carriers is a survival of that class of legislation which in former times extended to the details of personal conduct, and assumed to regulate the private affairs and business of men in the minutest particulars. This is true. But it has survived because it was entitled to survive. By reason of the changed conditions of society, and a truer appreciation of the proper functions of government, many things have fallen out of the range of the police power as formerly recognized, the regulation of which by legislation would now be regarded as invading personal liberty. But society could not safely surrender the power to regulate by law the business of common carriers. Its value has been infinitely increased by the conditions of modern commerce, under which the carrying trade of the country is, to a great extent, absorbed by corporations, and, as a check upon the greed of these consolidated interests, the legislative power of regulation is demanded by the most imperative public interests. The same principle upon which the control of common carriers rests has enabled the state to regulate in the public interest the charges of telephone and telegraph companies, and to make the telephone and telegraph, those important agencies of commerce, subservient to the wants and necessities of society. These regulations in no way interfere with a rational liberty, — liberty regulated by law.

There are elements of publicity in the business of elevating grain which peculiarly affect it with a public interest. They are found in the nature and extent of the business, its relation to the commerce of the state and country, and the practical monopoly enjoyed by those engaged in it. The extent of the business is shown by the facts to which we have referred. A large proportion of the surplus cereals of the country passes through the elevators at Buffalo, and finds its way through the Erie Canal and Hudson River to the seaboard at New York, from whence they are distributed to the markets of the world. The business of elevating grain is an incident to the business of transportation. The elevators are indispensable instrumentalities in the business of the common carrier. It is scarcely too much to say that, in a broad sense, the elevators perform the work of carriers. They are located upon or adjacent to the waters of the state, and transfer from the lake vessels to the canal-boats, or from the canal-boats to the ocean vessels, the cargo of grain, and thereby perform an essential service in transportation. It is by means of the elevators that transportation of grain by water from the upper lakes to the seaboard is rendered possible. It needs no argument to show that the business of elevating grain has a vital relation to commerce in one of its most important aspects. Every excessive charge made in the course of the transportation of grain is a tax on commerce, and the public have a deep interest that no exorbitant charges shall be exacted at any point upon the business of transportation. The state of New York, in the construction of the Erie Canal, exhibited its profound appreciation of the public interest involved in the encouragement of commerce. The legislature of the state, in entering upon the work of constructing a water-way between Lake Erie and the Atlantic Ocean, sets forth in the preamble of the originating act of 1817 its reasons for that great undertaking. "It will," the preamble says, "promote agriculture, manufactures, and commerce, mitigate the calamities of war, and enhance the blessings of peace, consolidate the Union, and advance the prosperity and elevate the character of the United States." In the construction and enlargement of the canal the state has expended vast sums of money, raised by taxation; and finally, to still further promote the interests of commerce, it has made the canal a free highway, and maintains it by a direct tax upon the people of the state. The wise forecast and statesmanship of the projectors of this work have been amply demonstrated by experience. It has largely contributed to the power and influence of the state, promoted the prosperity of the people, and to it, more perhaps than to any other single cause, is it owing that the city of New York has become the commercial centre of the Union.

Whatever impairs the usefulness of the canal as a highway of commerce involves the public interest. The people of New York are greatly interested to prevent any undue exactions in the business of transportation which shall enhance the cost of the necessaries of life,

or force the trade in grain into channels outside of our state. In Hooker *v.* Vandewater, 4 Denio, 349, the court was called upon to consider the validity of an agreement between certain transportation lines on the canal to keep up the price of freights. The court held the agreement to be illegal, and JEWETT, J., in pronouncing the judgment of the court, said: "That the raising of the price of freights for the transportation of merchandise or passengers upon our canals is a matter of public concern, and in which the public have a deep interest, does not admit of doubt. It is a familiar maxim that competition is the life of trade. It follows that whatever destroys, or even relaxes, competition in trade is injurious, if not fatal, to it." The same question came up a second time in Stanton *v.* Allen, 5 Denio, 434, and was decided the same way. In the course of its opinion the court said: "As these canals are the property of the state, constructed at great expense, as facilities to trade and commerce, and to foster and encourage agriculture, and are, at the same time, a munificent source of revenue, whatever concerns their employment and usefulness deeply involves the interests of the whole state." The fostering and protection of commerce was, even in ancient times, a favorite object of English law (Chit. Prerog. 162); and this author states that the "superintendence and care of commerce, on the success of which so materially depends the wealth and prosperity of the nation, are in various cases allotted to the king by the constitution," and many governmental powers vested in the sovereign in England have since our Revolution devolved on the legislatures of the states. The statutes of England in earlier time were full of oppressive commercial regulations, now, happily, to a great extent abrogated; but that the interests of commerce are matters of public concern all states and governments have fully recognized.

The third element of publicity which tends to distinguish the business of elevating grain from general commercial pursuits is the practical monopoly which is or may be connected with its prosecution. In the city of Buffalo the elevators are located at the junction of the canal with Lake Erie. The owners of grain are compelled to use them in transferring cargoes. The area upon which it is practicable to erect them is limited. The structures are expensive, and the circumstances afford great facility for combination among the owners of elevators to fix and maintain an exorbitant tariff of charges, and to bring into the combination any new elevator which may be erected, and employ it or leave it unemployed, but in either case permit it to share in the aggregate earnings. It is evident that if such a combination in fact exists the principle of free competition in trade is excluded. The precise object of the combination would be to prevent competition. The result of such a combination would necessarily be to subject the lake vessels and canal-boats to any exaction which the elevator owners might see fit to impose for the service of the elevator, and the elevator owners would be able to levy a tribute on the community, the extent of which would be limited only by their discretion.

It is upon these various circumstances that the court is called upon to determine whether the legislature may interfere and regulate the charges of elevators. It is purely a question of legislative power. If the power to legislate exists the court has nothing to do with the policy or wisdom of the interference in the particular case, or with the question of the adequacy or inadequacy of the compensation authorized. "This court," said CHASE, C. J., in the License Tax Cases, 5 Wall. 469, "can know nothing of public policy, except from the constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature. Questions of policy determined there are concluded here." Can it be said, in view of the exceptional circumstances, that the business of elevating grain is not "affected with a public interest," within the language of Lord HALE, or that the case does not fall within the principle which permits the legislature to regulate the business of common carriers, ferrymen, innkeepers, hackmen, and the interest on the use of money? It seems to us that speculative, if not fanciful, reasons have been assigned to account for the right of legislative regulation in these and other cases. It is said that the right to regulate the charges of hackmen springs from the fact that they are assigned stands in the public streets; that the legislature may regulate the toll on ferries because the right to establish a ferry is a franchise, and therefore the business is subject to regulation; that the right to regulate wharfage rested upon the permission of the sovereign to extend wharves into the beds of navigable streams, the title to which was in the sovereign; that the right to regulate the interest on the use of money sprung from the fact that taking interest was originally illegal at common law, and that where the right was granted by statute it was taken subject to regulation by law. The plain reason, we think, why the charges of hackmen and ferrymen were made subject to public regulation is that they were common carriers. The reason assigned for the right to regulate wharfage in England overlooks the fact that the title to the beds of navigable streams was frequently vested in a subject, and was his private property, subject to certain public rights, as the right of navigation, and no distinction as to the power of public regulation is suggested in the ancient books between wharves built upon the beds of navigable waters, the title to which was in the sovereign, and wharves erected upon navigable streams, the beds of which belonged to a subject. The obligation of the owner of the only wharf in a newly erected port to charge only reasonable wharfage is placed by Lord HALE on the ground of a virtual, as distinguished from a legal, monopoly. The reason assigned for the right to regulate interest takes no account of the fact that the prohibition by the ancient common law to take interest at all was a regulation, and this manifestly did not rest upon any benefit con-

ferred on the lenders of money. It was a regulation springing from a supposed public interest, and was peculiarly oppressive on a certain class. A law prohibiting the taking of interest on the use of money would now be deemed a violation of a right of property. But the material point is that the prohibition, as well as the regulation, of interest, was based upon public policy, and the present conceded right of regulation does not have its foundation in any grant or privilege conferred by the sovereign. The attempts made to place the right of public regulation in these cases upon the ground of special privilege conferred by the public on those affected cannot, we think, be supported. The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation. We rest the power of the legislature to control and regulate elevator charges on the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the canal, creating the business and making it possible, the interest to trade and commerce, the relation of the business to the prosperity and welfare of the state, and the practice of legislation in analogous cases. These circumstances collectively create an exceptional case, and justify legislative regulation.

The case of Munn *v.* Illinois has been frequently cited with approval by courts in other states. Nash *v.* Page, 80 Ky. 539; Hockett *v.* State, 105 Ind. 250; Telephone Co. *v.* Telegraph Co., 66 Md. 399; Davis *v.* State, 68 Ala. 58. In Nash *v.* Page it was held, upon the doctrine of the Munn Case, that warehousemen, for the public sale and purchase of tobacco in Louisville, exercised a public business, and assumed obligations to serve the entire public, and could not exclude persons from buying or selling tobacco in their warehouses who were not members of the board of trade. In Hockett *v.* State it was held that the relations which telephone companies have assumed towards the public imposed public obligations, and that all the instruments and appliances used by telephone companies in the prosecution of the business were, in legal contemplation, devoted to public use. In Telegraph Co. *v.* Telephone Co. legislation prohibiting discrimination in the business of telegraphing was upheld on the doctrine of the Munn Case. The criticism to which the Munn Case has been subjected has proceeded mainly on a limited and strict construction and definition of the police power. The ordinary subjects upon which it operates are well understood. It is most frequently exerted in the maintenance of public order, the protection of the public health and public morals, and in regulating mutual rights of property, and the use of property, so as to prevent uses by one of his property to the injury of the property of another. These are instances of its exercise, but they do not bound the sphere of its operation. In the King Case, 110 N. Y. 418, it was given a much broader scope, and was held to be efficient to prevent discrimination on the ground of race and color in places opened for public enter-

tainment. In that case the owner of the skating-rink derived no special privilege or protection from the state. The public held no right, in any legal sense, to resort to his premises. His permission, except for the public interest involved, was revocable as to the whole community or any individual citizen. But it was held that so long as he devoted his place to purposes of public entertainment he subjected it to public regulations. There is little reason, under our system of government, for placing a close and narrow interpretation on the police power, or in restricting its scope so as to hamper the legislative power in dealing with the varying necessities of society, and the new circumstances as they arise, calling for legislative intervention in the public interest. Life, liberty, and property have a substantial protection against serious invasion by the legislature in the traditions of the English-speaking race, and a pervading public sentiment which is quick to resent any substantial encroachment upon personal freedom or the rights of property. In no country is the force of public opinion so direct and imperative as in this. The legislature may transgress the principles of the Constitution. It has done so in the past, and it may be expected that it will sometimes do so in the future. But unconstitutional enactments have generally been the result of haste or inadvertence, or of transient and unusual conditions in times of public excitement which have been felt and responded to in the halls of legislation. The framers of the government wisely interposed the judicial power, and invested it with the prerogative of bringing every legislative act to the test of the Constitution. But no serious invasion of constitutional guaranties by the legislature can for a long time withstand the searching influence of public opinion, which sooner or later is sure to come to the side of law and order and justice, however much for a time it may have been swayed by passion or prejudice, or whatever aberration may have marked its course. So, also, in that wide range of legislative powers over persons and property which lie outside of the prohibitions of the Constitution, and which inhere of necessity in the very idea of government, by which persons and property may be affected without transgressing constitutional guaranties, there is a restraining and corrective power in public opinion which is a safeguard of tremendous force against unwise and impolitic legislation, hampering individual enterprise, and checking the healthful stimulus of self-interest, which are the life-blood of commercial progress. The police power may be used for illegitimate ends, although no court can say that the fundamental law has been violated. There is a remedy at the polls, and it is an efficient remedy if, at the bottom, the legislation under it is oppressive and unjust. The remedy by taking away the power of the legislature to act at will would, indeed, be radical and complete. But the moment the police power is destroyed or curbed by fixed and rigid rules a danger is introduced into our system which would, we think, be far greater than results from an occasional departure by the legislature from correct principles of

government. We here conclude our examination of the important question presented by this case. The division of opinion in this and other courts is evidence of the difficulty which surrounds it. But it is ever to be remembered that a statute must stand so long as any reasonable doubt can be indulged in favor of its constitutionality. We are of opinion that the statute of 1888 is constitutional, as a whole, and that although it may comprehend cases which, standing alone, might not justify legislative interference, yet they must be governed by the general rule enacted by the legislature. The judgment should be affirmed.

RUGER, C. J., and EARL, DANFORTH, and FINCH, JJ., concur.

PECKHAM, J., dissenting.[1] I contend that, within the subject now under review, the meaning of the phrase, "devoting one's property to a public use," . . . is that such devotion or dedication is made when by reason of it the public thereafter have a legal right to resort to the property, and to use it for a reasonable compensation, or for such as the law provides, or else where some privilege or right is granted by the government, in which case the right of limitation is based upon and is really a part consideration for the grant. In the one case the legal right to resort to and use the property by the public, so long as the owner chooses to remain in the business, springs from this dedication, and it is the criterion that is to decide the question whether the property has or has not been thus dedicated; and this right does not spring into existence merely because the business is such as interests a great number of the public, or because it is of large extent, or because there is no other property at that place which is or conveniently may be devoted to the same kind of business; while, in the other case, the right of limitation exists because some privilege or franchise has been granted to the owner by the sovereign power, an acceptance of which carries with it the burden of submitting to the demand for the service. As has been said, the right to regulate places of public amusement, such as theatres and the like, comes from another branch of the police power, and, as I believe, does not extend to the power to limit prices. The right to make use of the owner's property, by reason of a dedication, has been held to have been created in the exceptional cases of a common carrier, the keeper of a common inn, and a common or public wharfinger, and perhaps in some others. These are exceptional cases, for they trench upon the well-grounded principle that no man can be compelled to enter into business relations with another unless the party carrying on the business shall have received some privilege, right, or franchise from the sovereign power, when such compulsion may be annexed to the grant. The principle should not be extended. . . .

There can be no legal objection to the power to direct the weight of a loaf of bread, for that is a mere police regulation, interfering

[1] Part of this opinion is omitted. — ED.

with no man's real liberty, and it is the same as if the length of a yard were declared by law, or the weight of a ton. But I deny the right of any legislature in this country to limit the price for which an individual baker shall sell his bread per loaf, or the price per ton for which a coal dealer shall sell his coal, or the price which a tailor shall charge for his coat, or the shoemaker for his shoes. A common carrier exercises, it has been stated, a kind of public office, and when a man devotes himself to such a calling, and holds himself out to the public as a common carrier, he thereby grants to the public such an interest in his business that each individual has the legal right to demand the carriage of his property by the carrier upon payment or tender of a reasonable compensation for carriage, in the absence of a legal regulation thereof. Allen *v.* Sackrider, 37 N. Y. 341. He thus becomes a common carrier because of this dedication to the general public, and this legal right of the public to demand this service springs from such dedication. The same is true of a public wharfinger or the keeper of a common inn. They were all called "common" in their several occupations, and were common because they held themselves out as such to the public, and, as was said in some of the old books, entered into a general contract with the whole public to do the work, and hence arose the right of the public to call upon them to fulfil this contract. No such right of access to the premises of defendants exists, and no such right to demand the use of their property can be, or, as I understand, is pretended. But unless the innkeeper was the keeper of a common inn, or the carrier a common one, or the wharfinger was a public one, no matter what the extent of their business, or how large a number of the public were entertained by them, as the public had no right of resort to their premises, or to demand transportation for or the care of their goods, or entertainment at their house, the right of regulation did not exist as to the compensation they should receive. The cases are, as has been said, exceptions to the general rule that no man can be compelled to have business relations with another. . . .

The disposition of legislatures to interfere in the ordinary concerns of the individual, as evidenced by the laws enacted by parliaments and legislatures from the earliest times, and the futility of such interference to accomplish the purposes intended, have been the subject of remark by some of the ablest of English-speaking observers. Buckle, in his History of Civilization in England, in speaking of the course of English legislation, says: "Every great reform which has been effected has consisted, not in doing something new, but in undoing something old. The most valuable additions made to legislation have been enactments destructive of preceding legislation, and the best laws which have been passed have been those by which some former laws have been repealed." And again: "We find laws to regulate wages; laws to regulate prices; laws to regulate profits; laws to regulate the interest of money; custom-house arrangements of the most vexatious kind, aided by a complicated scheme,

which was well called the 'sliding-scale,' — a scheme of such perverse ingenuity that the duties constantly varied on the same article, and no man could calculate beforehand what he would have to pay. A system was organized, and strictly enforced, of interference with markets, interference with manufacturers, interference with machinery, interference even with shops. In other words, the industrious classes were robbed in order that industry might thrive." Volume I. pp. 199, 200, etc. The legislation under review is of the same general nature. To uphold legislation of this character is to provide the most frequent opportunity for arraying class against class; and, in addition to the ordinary competition that exists throughout all industries, a new competition will be introduced, that of competition for the possession of the government, so that legislative aid may be given to the class in possession thereof in its contests with rival classes or interests in all sections and corners of the industrial world. We shall have a recurrence of legislation which, it has been supposed, had been outgrown not only as illegal, but as wholly useless for any good effect, and only powerful for evil. Contests of such a nature are productive only of harm. The only safety for all is to uphold, in their full vigor, the healthful restrictions of our Constitution, which provide for the liberty of the citizen, and erect a safeguard against legislative encroachments thereon, whether exerted to-day in favor of what is termed the "laboring interests," or to-morrow in favor of the capitalists. Both classes are under its protection, and neither can interfere with the liberty of the citizen, without a violation of the fundamental law. In my opinion, the court should not strain after holding such species of legislation constitutional. It is so plain an effort to interfere with what seems to me the most sacred rights of property and the individual liberty of contract that no special intendment in its favor should be indulged in. It will not, as seems to me plain, even achieve the purposes of its authors. I believe it vain to suppose that it can be other than of the most ephemeral nature, at its best, or that it will have any real virtue in altering the general laws of trade, while, on the other hand, it may ruin or very greatly impair the value of the property of wholly innocent persons. If the compensation limited by the act is not sufficient to permit the average rate of profit upon the capital invested, it will result either in its evasion, or else the work will not be done, and the capital employed will seek other channels where such average rate can be realized, or the property will become of little or no value. If the compensation be sufficient, the same result aimed at would soon follow from the general laws of trade, from the law of supply and demand, and the general cost of labor and materials.

Every one having the same right to build an elevator or warehouse that these defendants have, and upon its completion to employ it in the same business, if the rate of profit is above the average, capital, if allowed absolute freedom and legal protection, will flow into the business until there is enough invested to do all or more than all the

work offered, and then, by the competition of capital, the rate of compensation would come down to the average. Such, at least, would be the tendency, and it could only be averted by combination among the owners of the property, which could not be long sustained in the face of perfect freedom to all to invest in such undertakings. That they are expensive, and require the outlay of a large amount of money to build and maintain them, and that the warehouses now existing may have an advantage in location, does not, as has been shown, make them a monopoly, but simply tends to make the inevitable result a trifle more slow in its approach than in other cases requiring a smaller outlay. If it be said that there is already a superabundance of elevators, more than can be or are used, and that some of them lie idle while others do the work, and they all share in the profit, if the profit exceed what the owners of the grain or those engaged in its transportation can afford to pay, the result will then be that the persons so engaged will cease from that kind of work, or else the owners of the elevators will reduce their charges. This reduction of charges will most surely take place before the owners of the elevators would allow the business to pass out of existence, provided the compensation after such reduction would enable them to realize the average rate of profit for their capital; while, if it would not, it would be conclusive proof that the business of transportation of grain or other commodities, where the boats were to be loaded or unloaded by elevators, could no longer be conducted with profit to all parties, and some new way would have to be discovered and put in practice; for capital will not seek investment or employment where the average rate of profit cannot be commanded, and men will not continue to transport grain or any other commodity at a loss, or upon such terms that they cannot earn a livelihood. If this is the case in the transportation of grain by the canal, owing to the competition of railroads and their ability to transport it cheaply and rapidly then that fact must be faced. Such a business cannot be maintained for any length of time by legislation, at the expense either of capital or of the transporter. Each must earn the average profit in the same general line of business, or the business must, from economical reasons, cease. The legislation under consideration is not only vicious in its nature, communistic in its tendency, and, in my belief, wholly inefficient to permanently obtain the result aimed at, but, for the reasons already given, it is an illegal effort to interfere with the lawful privilege of the individual to seek and obtain such compensation as he can for the use of his own property, where he neither asks nor receives from the sovereign power any special right or immunity not given to and possessed by every other citizen, and where he has not devoted his property to any public use, within the meaning of the law. The orders of the general and special terms of the Supreme Court should therefore be reversed, and the relators discharged.

GRAY, J., concurs.

A writ of error was brought in the Supreme Court of the United States. Mr. Justice BLATCHFORD delivered the opinion of the court.[1]

This court, in *Munn* v. *Illinois*, the opinion being delivered by Chief Justice Waite, and there being a published dissent by only two justices, considered carefully the question of the repugnancy of the Illinois statute to the Fourteenth Amendment. It said, that under the powers of government inherent in every sovereignty, "the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good;" and that, "in their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold." It was added: "To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property." It announced as its conclusions that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law; that, when private property was devoted to a public use, it was subject to public regulation; that Munn and Scott, in conducting the business of their warehouse, pursued a public employment and exercised a sort of public office, in the same sense as did a common carrier, miller, ferryman, innkeeper, wharfinger, baker, cartman or hackney coachman; that they stood in the very gateway of commerce and took toll from all who passed; that their business tended "to a common charge," and had become a thing of public interest and use; that the toll on the grain was a common charge; and that, according to Lord Chief Justice Hale, every such warehouseman "ought to be under a public regulation, *viz.*," that he "take but reasonable toll."

This court further held in *Munn* v. *Illinois*, that the business in question was one in which the whole public had a direct and positive interest; that the statute of Illinois simply extended the law so as to meet a new development of commercial progress; that there was no attempt to compel the owners of the warehouses to grant the public an interest in their property, but to declare their obligations if they used it in that particular manner; that it mattered not that Munn and Scott had built their warehouses and established their business before the regulations complained of were adopted; that, the property being clothed with a public interest, what was a reasonable compensation for its use was not a judicial, but a legislative question; that, in countries where the common law prevailed, it had been customary from time

[1] An extract from the opinion only is given. — ED.

immemorial for the legislature to declare what should be a reasonable compensation under such circumstances, or to fix a maximum beyond which any charge made would be unreasonable; that the warehouses of Munn and Scott were situated in Illinois and their business was carried on exclusively in that State; that the warehouses were no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another; that their regulation was a thing of domestic concern; that, until Congress acted in reference to their interstate relations, the State might exercise all the powers of government over them, even though in so doing it might operate indirectly upon commerce outside its immediate jurisdiction; and that the provision of § 9 of article 1 of the Constitution of the United States operated only as a limitation of the powers of Congress, and did not affect the States in the regulation of their domestic affairs. The final conclusion of the court was, that the Act of Illinois was not repugnant to the Constitution of the United States; and the judgment was affirmed.

In *Sinking Fund Cases*, 99 U. S. 700, 747, Mr. Justice Bradley, who was one of the justices who concurred in the opinion of the court in *Munn* v. *Illinois*, speaking of that case, said: "The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power." Although this was said in a dissenting opinion in *Sinking Fund Cases*, it shows what Mr. Justice Bradley regarded as the principle of the decision in *Munn* v. *Illinois*.

In *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 354, this court said: "That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in *Munn* v. *Illinois*, 94 U. S. 113. As was said in that case, such regulations do not deprive a person of his property without due process of law."

In *Wabash &c. Railway Co.* v. *Illinois*, 118 U. S. 557, 569, Mr. Justice Miller, who had concurred in the judgment in *Munn* v. *Illinois*, referred, in delivering the opinion of the court, to that case, and said: "That case presented the question of a private citizen, or unincorporated partnership, engaged in the warehousing business in Chicago, free from any claim of right or contract under an Act of Incorporation of any State whatever, and free from the question of continuous transportation through several States. And in that case the court was presented with the question, which it decided, whether any one engaged in a public business, in which all the public had a right to require his

service, could be regulated by Acts of the Legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services."

In *Dow* v. *Beidelman*, 125 U. S. 680, 686, it was said by Mr. Justice Gray, in delivering the opinion of the court, that in *Munn* v. *Illinois* the court, after affirming the doctrine that by the common law carriers or other persons exercising a public employment could not charge more than a reasonable compensation for their services, and that it is within the power of the legislature "to declare what shall be a reasonable compensation for such services, or perhaps, more properly speaking, to fix a maximum beyond which any charge made would be unreasonable," said that to limit the rate of charges for services rendered in the public employment, or for the use of property in which the public has an interest, was only changing a regulation which existed before, and established no new principle in the law, but only gave a new effect to an old one.

In *Chicago &c. Railway Co.* v. *Minnesota*, 134 U. S. 418, 461, it was said by Mr. Justice Bradley, in his dissenting opinion, in which Mr. Justice Gray and Mr. Justice Lamar concurred, that the decision of the court in that case practically overruled *Munn* v. *Illinois;* but the opinion of the court did not say so, nor did it refer to *Munn* v. *Illinois;* and we are of opinion that the decision in the case in 134 U. S. is, as will be hereafter shown, quite distinguishable from the present cases.

It is thus apparent that this court has adhered to the decision in *Munn* v. *Illinois* and to the doctrines announced in the opinion of the court in that case; and those doctrines have since been repeatedly enforced in the decisions of the courts of the States.

In *Railway* v. *Railway*, 30 Ohio St. 604, 616, in 1877, it was said, citing *Munn* v. *Illinois:* "When the owner of property devotes it to a public use, he, in effect, grants to the public an interest in such use, and must, to the extent of the use, submit to be controlled by the public, for the common good, as long as he maintains the use." That was a decision by the Supreme Court Commission of Ohio.

In *State* v. *Gas Company*, 34 Ohio St. 572, 582, in 1878, *Munn* v. *Illinois* was cited with approval, as holding that where the owner of property devotes it to a use in which the public have an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, so long as he maintains the use; and the court added that in *Munn* v. *Illinois* the principle was applied to warehousemen engaged in receiving and storing grain; that it was held that their rates of charges were subject to legislative regulation; and that the principle applied with greater force to corporations when they were invested with franchises to be exercised to subserve the public interest.

The Supreme Court of Illinois, in *Ruggles* v. *People*, 91 Illinois, 256, 262, in 1878, cited *Munn* v. *People*, 69 Illinois, 80, which was

affirmed in *Munn* v. *Illinois*, as holding that it was competent for the General Assembly to fix the maximum charges by individuals keeping public warehouses for storing, handling and shipping grain, and that, too, when such persons had derived no special privileges from the State, but were, as citizens of the State, exercising the business of storing and handling grain for individuals.

The Supreme Court of Alabama, in *Davis* v. *The State*, 68 Alabama, 58, in 1880, held that a statute declaring it unlawful, within certain counties, to transport or move, after sunset and before sunrise of the succeeding day, any cotton in the seed, but permitting the owner or purchaser to remove it from the field to a place of storage, was not unconstitutional. Against the argument that the statute was such a despotic interference with the rights of private property as to be tantamount, in its practical effect, to a deprivation of ownership "without due process of law," the court said that the statute sought only to regulate and control the transportation of cotton in one particular condition of it, and was a mere police regulation, to which there was no constitutional objection, citing *Munn* v. *Illinois*. It added, that the object of the statute was to regulate traffic in the staple agricultural product of the State, so as to prevent a prevalent evil, which, in the opinion of the law-making power, might do much to demoralize agricultural labor and to destroy the legitimate profits of agricultural pursuits, to the public detriment, at least within the specified territory.

In *Baker* v. *The State*, 54 Wisconsin, 368, 373, in 1882, *Munn* v. *Illinois* was cited with approval by the Supreme Court of Wisconsin, as holding that the Legislature of Illinois had power to regulate public warehouses, and the warehousing and inspection of grain within that State, and to enforce its regulations by penalties, and that such legislation was not in conflict with any provision of the Federal Constitution.

The Court of Appeals of Kentucky, in 1882, in *Nash* v. *Page*, 80 Kentucky, 539, 545, cited *Munn* v. *Illinois*, as applicable to the case of the proprietors of tobacco warehouses in the city of Louisville, and held that the character of the business of the tobacco warehousemen was that of a public employment, such as made them subject, in their charges and their mode of conducting business, to legislative regulation and control, as having a practical monopoly of the sales of tobacco at auction.

In 1884, the Supreme Court of Pennsylvania, in *Girard Storage Co.* v. *Southwark Co.*, 105 Penn. St. 248, 252, cited *Munn* v. *Illinois* as involving the rights of a private person, and said that the principle involved in the ruling of this court was, that where the owner of such property as a warehouse devoted it to a use in which the public had an interest, he in effect granted to the public an interest in such use, and must, therefore, to the extent thereof, submit to be controlled by the public for the common good, as long as he maintained that use.

In *Sawyer* v. *Davis*, 136 Mass. 239, in 1884, the Supreme Judicial Court of Massachusetts said that nothing is better established than the

power of the legislature to make what are called police regulations, declaring in what manner property shall be used and enjoyed and business carried on, with a view to the good order and benefit of the community, even though they may interfere to some extent with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced; and *Munn* v. *Illinois* was cited as holding that the rules of the common law which had from time to time been established, declaring or limiting the right to use or enjoy property, might themselves be changed as occasion might require.

The Supreme Court of Indiana, in 1885, in *Brechbill* v. *Randall*, 102 Indiana, 528, held that a statute was valid which required persons selling patent rights to file with the clerk of the county a copy of the patent, with an affidavit of genuineness and authority to sell, on the ground that the State had power to make police regulations for the protection of its citizens against fraud and imposition; and the court cited *Munn* v. *Illinois* as authority.

The Supreme Court of Nebraska, in 1885, in *Webster Telephone Case*, 17 Nebraska, 126, held that when a corporation or person assumed and undertook to supply a public demand, made necessary by the requirements of the commerce of the country, such as a public telephone, such demand must be supplied to all alike, without discrimination; and *Munn* v. *Illinois* was cited by the prevailing party and by the court. The defendant was a corporation, and had assumed to act in a capacity which was to a great extent public, and had undertaken to satisfy a public want or necessity, although it did not possess any special privileges by statute or any monopoly of business in a given territory; yet it was held that, from the very nature and character of its business, it had a monopoly of the business which it transacted. The court said that no statute had been deemed necessary to aid the courts in holding that where a person or company undertook to supply a public demand, which was "affected with a public interest," it must supply all alike who occupied a like situation, and not discriminate in favor of or against any.

In *Stone* v. *Yazoo & Miss. Valley R. Co.*, 62 Mississippi, 607, 639, the Supreme Court of Mississippi, in 1885, cited *Munn* v. *Illinois* as deciding that the regulation of warehouses for the storage of grain, owned by private individuals, and situated in Illinois, was a thing of domestic concern and pertained to the State, and as affirming the right of the State to regulate the business of one engaged in a public employment therein, although that business consisted in storing and transferring immense quantities of grain in its transit from the fields of production to the markets of the world.

In *Hockett* v. *The State*, 105 Indiana, 250, 258, in 1885, the Supreme Court of Indiana held that a statute of the State which prescribed the maximum price which a telephone company should charge for the use of its telephones was constitutional, and that in legal contemplation all the instruments and appliances used by a telephone

company in the transaction of its business were devoted to a public use, and the property thus devoted became a legitimate subject of legislative regulation. It cited *Munn* v. *Illinois* as a leading case in support of that proposition, and said that although that case had been the subject of comment and criticism, its authority as a precedent remained unshaken. This doctrine was confirmed in *Central Union Telephone Co.* v. *Bradbury*, 106 Indiana, 1, in the same year, and in *Central Union Telephone Co.* v. *The State*, 118 Indiana, 194, 207, in 1888, in which latter case *Munn* v. *Illinois* was cited by the court.

In *Chesapeake & Potomac Telephone Co.* v. *Balto. & Ohio Telegraph Co.*, 66 Maryland, 399, 414, in 1886, it was held that the telegraph and the telephone were public vehicles of intelligence, and those who owned or controlled them could no more refuse to perform impartially the functions which they had assumed to discharge than a railway company, as a common carrier, could rightfully refuse to perform its duty to the public; and that the legislature of the State had full power to regulate the services of telephone companies, as to the parties to whom facilities should be furnished. The court cited *Munn* v. *Illinois*, and said that it could no longer be controverted that the legislature of a State had full power to regulate and control, at least within reasonable limits, public employments and property used in connection therewith; that the operation of the telegraph and the telephone in doing a general business was a public employment, and the instruments and appliances used were property devoted to a public use and in which the public had an interest; and that, such being the case, the owner of the property thus devoted to public use must submit to have that use and employment regulated by public authority for the common good.

In the Court of Chancery of New Jersey, in 1889, in *Delaware, &c. Railroad Co.* v. *Central Stock-Yard Co.*, 45 N. J. Eq. 50, 60, it was held that the legislature had power to declare what services warehousemen should render to the public, and to fix the compensation that might be demanded for such services; and the court cited *Munn* v. *Illinois* as properly holding that warehouses for the storage of grain must be regarded as so far public in their nature as to be subject to legislative control, and that when a citizen devoted his property to a use in which the public had an interest, he in effect granted to the public an interest in that use, and rendered himself subject to control, in that use, by the body politic.

In *Zanesville* v. *Gas-Light Company*, 47 Ohio St. 1, in 1889, it was said by the Supreme Court of Ohio, that the principle was well established, that where the owner of property devotes it to a use in which the public have an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public for the common good, as long as he maintains the use; and that such was the point of the decision in *Munn* v. *Illinois*.

We must regard the principle maintained in *Munn* v. *Illinois* as firmly established, and we think it covers the present cases.

Judgment affirmed.

BREWER, J., gave a dissenting opinion, in which FIELD, J., and BROWN, J., concurred.

PORTLAND NATURAL GAS AND OIL CO. *v.* STATE.

SUPREME COURT OF INDIANA, 1893.

[135 *Ind.* 54 : 34 *N. E.* 818.]

COFFEY, J. This was an action by the appellee against the appellant to compel the latter, by *mandamus*, to supply the residence of the relator with natural gas to be used as lights and fuel. It appears from the complaint that the appellant is a corporation duly organized under the laws of this state for the purpose, among others, of supplying to those within its reach natural gas to be used for lights and fuel. By permission of the common council, it has laid its pipes for that purpose in the streets and alleys of the city of Portland, in this state, and has pipes laid in Walnut Street of that city. The relator resides on Walnut Street, on the line of one of the appellant's main pipes. His house is properly and safely plumbed for the purpose of obtaining natural gas. In May, 1890, the relator demanded of the appellant gas service, and tendered to it the usual and proper charges for such service; but it refused, by its officers, to furnish the gas demanded, whereupon this suit was brought to compel it to furnish the gas desired by the relator. The court overruled a demurrer to the complaint. . . .

The vital question in the case relates to the right of the relator to compel the appellant, by *mandamus*, to supply his dwelling-house with natural gas for lights and fuel. There are cases which hold that in the absence of a contract, express or implied, and where the charter of the company contains no provision upon the subject, a gas company is under no more obligation to continue to supply its customers than the vendor of other merchandise, — among which is the case of Com. *v.* Lowell Gaslight Co., 12 Allen, 75. But we think that the better reason, as well as the weight of authority, is against this holding. Mr. Beach, in his work on Private Corporations (Volume II., § 835), says: "Gas companies, being engaged in a business of a public character, are charged with the performance of public duties. Their use of the streets, whose fee is held by the municipal corporation in trust for the benefit of the public, has been likened to the exercise of the power of eminent domain. Accordingly a gas company is bound to supply gas to premises with which its pipes are connected." Mr. Cook, in his work on Stock and Stock-

holders and Corporation Law (section 674), says: "Gas companies, also, are somewhat public in their nature, and owe a duty to supply gas to all." To the same effect are the following adjudicated cases: State *v.* Columbus Gaslight & Coke Co., 34 Ohio St. 572; New Orleans Gaslight Co. *v.* Louisiana Light & Heat Producing, etc., Co., 115 U. S. 650; People *v.* Manhattan Gaslight Co., 45 Barb. 136; Gibbs *v.* Gas Co., 130 U. S. 396; Williams *v.* Gas Co., 52 Mich. 499; Gaslight Co. *v.* Richardson, 63 Barb. 437. Our general assembly, recognizing the fact that natural gas companies were, in a sense, public corporations, conferred upon them the right of eminent domain by an act approved February 20, 1889 (Acts 1889, p. 22). It has often been held that *mandamus* is the proper proceeding by which to compel a gas company to furnish gas to those entitled to receive it. 8 Amer. & Eng. Enc. Law, pp. 1284–1289; People *v.* Manhattan Gaslight Co., *supra;* Williams *v.* Gas Co., *supra;* Gaslight Co. *v.* Richardson, *supra.* In view of these authorities, we are constrained to hold that a natural gas company, occupying the streets of a town or city with its mains, owes it as a duty to furnish those who own or occupy the houses abutting on such street, where such owners or occupiers make the necessary arrangements to receive it, and comply with the reasonable regulations of such company, such gas as they may require, and that, where it refuses or neglects to perform such duty, it may be compelled to do so by writ of *mandamus.* As to the sufficiency of an answer averring that the company had not a sufficient supply to furnish all those demanding gas, we intimate no opinion, as no such defence was interposed in this case. It follows that the complaint in this case states a cause of action against the appellant, and that the court did not err in overruling the demurrer thereto. *Judgment affirmed.*[1]

PEOPLE *v.* CHICAGO AND ALTON RAILROAD.

SUPREME COURT OF ILLINOIS, 1889.

[130 *Ill.* 175: 22 *N. E.* 857.]

BAILEY, J. This was a petition for a *mandamus*, brought by the people of the state of Illinois, on the relation of the attorney-general, against the Chicago & Alton Railroad Company, to compel said company to establish and maintain a station for the receipt and discharge of passengers and freight at Upper Alton, in Madison County.[2] . . .

To the petition the defendant interposed a general demurrer, which was sustained by the court, and the attorney-general electing to abide by his petition, final judgment was entered in favor of the defendant. From that judgment the petitioners have appealed to this court.

[1] *Acc.* Coy *v.* Gas Co., 146 Ind. 655; 46 N. E. 17.

[2] The recital of the petition is omitted. — ED.

There is, so far as we have been able to discover, no provision of any statute which can be appealed to in support of the prayer of the petition. Neither in the defendant's charter nor in any other act of the general assembly does there seem to be any attempt to prescribe the rules by which the defendant is to be governed in the location of its freight and passenger stations, or to confer upon the Circuit Court the power to interpose and direct as to their location. It is plain that the act of 1877, the only one to which we are referred in this connection, can have no application. That act provides "that all railroad companies in this state, carrying passengers or freight, shall, and they are hereby required to, build and maintain depots for the comfort of passengers, and for the protection of shippers of freight, where such railroad companies are in the practice of receiving and delivering passengers and freight, at all towns and villages on the line of their roads having a population of five hundred or more." 2 Starr & C. St. 1924. While it is true that Upper Alton is a town having a population of more than 500, it affirmatively appears that it is not a place where the defendant has been in the practice of receiving and delivering passengers and freight, and so is not within the provisions of said act. The petition seeks to have the defendant compelled to establish a station where none has heretofore existed, while the statute merely requires the erection of suitable depot buildings at places where the railway company has already located its stations, and is in the practice of receiving and discharging passengers and freight. In point of fact, the attorney-general, in his argument upon the rehearing, admits that there is no statute upon which his prayer for a *mandamus* can be based; the position now taken by him being that upon the facts alleged in the petition and admitted by the demurrer, the legal duty on the part of the defendant to establish a freight and passenger station on its line of railway in the town of Upper Alton arises by virtue of the principles of the common law.

It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers, are vested with a very broad discretion in the matter of locating, constructing, and operating their railways, and of locatiug and maintaining their freight and passenger stations. This discretion, however, is not absolute, but is subject to the condition that it must be exercised in good faith, and with a due regard to the necessities and convenience of the public. Railway companies, though private corporations, are engaged in a business in which the public have an interest, and in which such companies are public servants, and amenable as such. This doctrine has been repeatedly announced by this and other courts. Thus, in Marsh *v.* Railroad Co., 64 Ill. 414, which was a bill for the specific performance of a contract by which the railway company agreed to locate its passenger and freight depots at a particular point in a certain town, and at no other point in said town,

we said: "This is not a case which concerns merely the private interests of two suitors. It is a matter where the public interest is involved. Railroad companies are incorporated by authority of law, not for the promotion of mere private ends, but in view of the public good they subserve. It is the circumstance of public use which justifies the exercise on their behalf of the right of eminent domain in the taking of private property for the purpose of their construction. They have come to be almost a public necessity; the general welfare being largely dependent upon these modes of intercommunication, and the manner of carrying on their operations." In the same case, in holding that the contract there in question ought not to be specifically enforced, we further said: "Railroad companies, in order to fulfil one of the ends of their creation, — the promotion of the public welfare, — should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require."

In Railway Co. *v.* People, 120 Ill. 200, which was a petition for a *mandamus* to compel the railway company to repair, generally, a certain portion of its road, and to increase its passenger trains thereon, we said: "There can be no doubt of the duty of a railway company to keep its road in a reasonable state of repair, and in a safe condition. Nor is there any doubt of its duty to so operate it as to afford adequate facilities for the transaction of such business as may be offered it, or at least reasonably be expected. . . . The company, however, is given, as it should be, a very large discretion in determining all questions relating to the equipment and operation of its road; hence courts, as a general rule, will not interfere with the management of railways in these respects, except where the act sought to be enforced is specific, and the right to its performance in the manner proposed is clear and undoubted."

It is in recognition of the paramount duty of railway companies to establish and maintain their depots at such points, and in such manner, as to subserve the public necessities and convenience that it has been held by all the courts, with very few exceptions, that contracts materially limiting their power to locate and relocate their depots are against public policy, and therefore void. Railroad Co. *v.* Mathers, 71 Ill. 592; Railroad Co. *v.* Mathers, 104 Ill. 257; Bestor *v.* Wathen, 60 Ill. 138; Linder *v.* Carpenter, 62 Ill. 309; Railroad Co. *v.* Ryan, 11 Kas. 602; Railroad Co. *v.* Seely, 45 Mo. 212; Holladay *v.* Patterson, 5 Or. 177; Tayl. Corp. § 162, and authorities cited.

We have now to consider whether in the light of the principles above laid down, a right to the relief prayed for is sufficiently shown by the petition. There can be no doubt that the act sought to be enforced (the establishment and maintenance of a freight and passenger station on the defendant's line of railway at a convenient point within the town of Upper Alton) is sufficiently specific to be enforced by *mandamus;* and it only remains to be seen whether the right to

have its performance enforced is shown to be clear and undoubted. It should be observed that there is no controversy as to the facts; the allegations of the petition being, for all the purposes of this appeal, conclusively admitted by the demurrer.

The petition undertakes to show the public importance and necessity of the station asked for in two ways: *First*, by alleging the facts and circumstances which tend to prove it; and, *secondly*, by directly averring it. It cannot be doubted, we think, that the facts alleged make out a clear and strong case of public necessity. They show that Upper Alton is a town of over 1,800 inhabitants, situated on the line of the defendant's railway about midway between two other stations seven miles apart. The residents of the town and vicinity are shown to be possessed of at least the ordinary inclination to travel by railway, and it is averred that many of them have occasion and desire to travel by the defendant's railway between Upper Alton and other points on the line of said railway. Various manufacturing and other business enterprises are shown to be carried on within the town, creating a necessity for the use of said railway for the transportation of manufactured articles, merchandise, and other freights. To avail themselves of transportation upon trains which pass by their doors, the inhabitants of Upper Alton are compelled to go and transport their freights by other conveyances to a neighboring town about three and one-half miles away. Then, as we have already said, the petition directly avers, and the demurrer admits, that the accommodation of the public living in and near said town requires, and long has required, the establishment of a passenger and freight depot on the line of its road within said town. Unless, then, there is some explanation for the course pursued by the defendant which the record does not give, we cannot escape the conviction that its conduct in the premises exhibits an entire want of good faith in its efforts to perform its public functions as a common carrier, and an unwarrantable disregard of the public interests and necessities. It cannot be admitted that the discretion vested in the defendant in the matter of establishing and maintaining its freight and passenger stations extends so far as to justify such manifest and admitted disregard of its duties to the public.

We are of the opinion that the petition shows a clear and undoubted right on the part of the public to the establishment and maintenance of a freight and passenger station on the line of the defendant's railway in the town of Upper Alton, and it therefore follows that the demurrer to the petition should have been overruled.

MOBILE & OHIO RAILROAD *v.* PEOPLE.

SUPREME COURT OF ILLINOIS, 1890.

[132 *Ill.* 559 : 24 *N. E.* 643.]

SCHOLFIELD, J.[1] Railway stations for the receipt and discharge of passengers and freight are for the mutual profit and convenience of the company and the public. Their location at points most desirable for the convenience of travel and business is alike indispensable to the efficient operation of the road and the enjoyment of it as a highway by the public. Necessarily, therefore, the company cannot be compelled, on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to communities on the line of the road reasonable access to its use. The duty to maintain or continue stations must, manifestly, rest upon the same principle, and a company cannot, therefore, be compelled to maintain or continue a station at a point where the welfare of the company and the country in general require that it should be changed to some other point. And so we have held that a railway company cannot bind itself by contract with individuals to locate and maintain stations at particular points, or to not locate and maintain them at other points. Bestor *v.* Wathen, 60 Ill. 138; Linder *v.* Carpenter, 62 Ill. 309; Marsh *v.* Railroad Co., 64 Ill. 414; Railroad Co. *v.* Mathers, 71 Ill. 592; Same Case again in 104 Ill. 257; Snell *v.* Pells, 113 Ill. 145. The power of election in the location of the line of the railway referred to in People *v.* Louisville & N. R. Co., 120 Ill. 48, results from the franchise granted by the charter to exercise the right of eminent domain, and is therefore totally different from the power of locating stations, which, from its very nature, is a continuing one. And so we said in Marsh *v.* Railroad Co., *supra*, where a bill had been filed for the specific performance of a contract to locate and maintain a station at a particular part: "Railroad companies, in order to fulfil one of the ends of their creation — the promotion of the public welfare — should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require." And so, again, we said in Railroad Co. *v.* Mathers, *supra*: "Whenever the public convenience requires that a station on a railroad should be established at a particular point, and it can be done without detriment to the interests of the stockholders of the company, the law authorizes it to be established there, and no contract between a board of directors and individuals can be allowed to prohibit it." And in the very recent case of People *v.* Chicago & A. R. Co., 130 Ill. 175, where we awarded a *mandamus* commanding the location and

[1] Part of the opinion only is given. — ED.

maintaining of a station at a point where no station had before been located and maintained, we said: "It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers are vested with a very broad discretion in the matter of locating, constructing, and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however, is not absolute, but is subject to the condition that it must be exercised in good faith, and with a due regard to the necessities and convenience of the public."

The rule has been so often announced by this court that it is unnecessary to cite the cases; that a *mandamus* will never be awarded unless the right to have the thing done which is sought is clearly established. If the right is doubtful, the writ will be refused. The burden was on the relator to prove a case authorizing the issuing of the writ, and in our opinion that proof has not been made. . . . The judgment of the Circuit Court is reversed, and the cause is remanded to that court with direction to enter judgment for the respondent.

NORTHERN PACIFIC RAILROAD *v.* WASHINGTON.

SUPREME COURT OF THE UNITED STATES, 1892.

[142 *U. S.* 492.]

A petition in the name of the Territory of Washington, at the relation of the prosecuting attorney for the county of Yakima and four other counties in the territory, was filed in the District Court of the fourth judicial district of the territory on February 20, 1885, for a *mandamus* to compel the Northern Pacific Railroad Company to erect and maintain a station at Yakima City, on the Cascade branch of its railroad, extending from Pasco Junction, on the Columbia River, up the valley of the Yakima River and through the county of Yakima, towards Puget Sound, and to stop its trains there to receive and deliver freight, and to receive and let off passengers.[1]

Mr. JUSTICE GRAY, after stating the case as above, delivered the opinion of the Court.

A writ of *mandamus* to compel a railroad corporation to do a particular act in constructing its road or buildings, or in running its trains, can be issued only when there is a specific legal duty on its part to do that act, and clear proof of a breach of that duty.

If, as in Railroad *v.* Hall, 91 U. S. 343, the charter of a railroad corporation expressly requires it to maintain its railroad as a continuous line, it may be compelled to do so by *mandamus*. So if the charter requires the corporation to construct its road and to run its cars to a certain point on tide-water (as was held to be the case in

[1] Part of the statement of the case is omitted. — ED.

State *v.* Railroad, 29 Conn. 538), and it has so constructed its road and used it for years, it may be compelled to continue to do so. And *mandamus* will lie to compel a corporation to build a bridge in accordance with an express requirement of statute. Railway *v.* Mississippi, 112 U. S. 12; People *v.* Railroad, 70 N. Y. 569.

But if the charter of a railroad corporation simply authorizes the corporation, without requiring it, to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by *mandamus* to complete or to maintain its road to that point when it would not be remunerative. Railway Co. *v.* Queen, 1 El. & Bl. 858; Id. 874; Com. *v.* Railroad, 12 Gray, 180; State *v.* Railroad, 18 Minn. 40.

The difficulties in the way of issuing a *mandamus* to compel the maintenance of a railroad and the running of trains to a terminus fixed by the charter itself are much increased when it is sought to compel the corporation to establish or to maintain a station and to stop its trains at a particular place on the line of its road. The location of stations and warehouses for receiving and delivering passengers and freight involves a comprehensive view of the interests of the public, as well as of the corporation and its stockholders, and a consideration of many circumstances concerning the amount of population and business at, or near, or within convenient access to one point or another, which are more appropriate to be determined by the directors, or, in case of abuse of their discretion, by the legislature, or by administrative boards intrusted by the legislature with that duty, than by the ordinary judicial tribunals.

The defendant's charter, after authorizing and empowering it to locate, construct, and maintain a continuous railroad "by the most eligible route, as shall be determined by said company," within limits described in the broadest way, both as to the terminal points and as to the course and direction of the road, and vesting it with "all the powers, privileges, and immunities necessary to carry into effect the purposes of this act as herein set forth," enacts that the road "shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances." The words last quoted are but a general expression of what would be otherwise implied by law, and cover all structures of every kind needed for the completion and maintenance of the railroad. They cannot be construed as imposing any specific duty, or as controlling the discretion in these respects of a corporation intrusted with such large discretionary powers upon the more important questions of the course and the termini of its road. The contrast between these general words and the specific requirements, which follow in the same section, that the rails shall be manufactured from American iron, and that "a uniform gauge shall be established throughout the entire length of the road," is significant.

To hold that the directors of this corporation, in determining the number, place, and size of its stations and other structures, having regard to the public convenience as well as to its own pecuniary interests, can be controlled by the courts by writ of *mandamus,* would be inconsistent with many decisions of high authority in analogous cases.

The constitution of Colorado, of 1876, art. 15, § 4, provided that "all railroads shall be public highways, and all railroad companies shall be common carriers;" and that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad." Section 6 of the same article was as follows: "All individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager, or employee thereof, shall give any preference to individuals, associations, or corporations in furnishing car or motive power." The General Laws of Colorado, of 1877, c. 19, § 111, authorized every railroad company "to cross, intersect, or connect its railways with any other railway," "to receive and convey persons and property on its railway," and "to erect and maintain all necessary and convenient buildings and stations, fixtures and machinery, for the convenience, accommodation, and use of passengers, freights, and business interests, or which may be necessary for the construction or operation of said railway." This court held that section 6 of article 15 of the constitution of Colorado was only declaratory of the common law; that the right secured by section 4 to connect railroads was confined to their connection as physical structures, and did not imply a connection of business with business; and that neither the common law, nor the constitution and statutes of Colorado, compelled one railroad corporation to establish a station or to stop its cars at its junction with the railroad of another corporation, although it had established a union station with the connecting railroad of a third corporation, and had made provisions for the transaction there of a joint business with that corporation. Chief Justice WAITE, in delivering the opinion, said: "No statute requires that connected roads shall adopt joint stations, or that one railroad company shall stop at or make use of the station of another. Each company in the state has the legal right to locate its own stations, and, so far as statutory regulations are concerned, is not required to use any other. A railroad company is prohibited, both by the common law and by the constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road; but that does not necessarily imply that it must stop at the junction of one and interchange business there because it has established joint depot accommodations and provided facilities for doing a connecting busi-

ness with another company at another place. A station may be established for the special accommodation of a particular customer; but we have never heard it claimed that every other customer could, by a suit in equity, in the absence of a statutory or contract right, compel the company to establish a like station for his special accommodation at some other place. Such matters are, and always have been, proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for injustice of that kind can only be obtained from the legislature. A court of chancery is not, any more than is a court of law, clothed with legislative power." Atchison, T. & S. F. R. Co. *v.* Denver & N. O. R. Co., 110 U. S. 667, 681, 682.

The Court of Appeals of New York, in a very recent case, refused to grant a *mandamus* to compel a railroad corporation to construct and maintain a station and warehouse of sufficient capacity to accommodate passengers and freight at a village containing 1,200 inhabitants, and furnishing to the defendant at its station therein a large freight and passenger business, although it was admitted that its present building at that place was entirely inadequate; that the absence of a suitable one was a matter of serious damage to large numbers of persons doing business at that station; that the railroad commissioners of the state, after notice to the defendant, had adjudged and recommended that it should construct a suitable building there within a certain time; and that the defendant had failed to take any steps in that direction, not for want of means or ability, but because its directors had decided that its interests required it to postpone doing so. The court, speaking by Judge DANFORTH, while recognizing that "a plainer case could hardly be presented of a deliberate and intentional disregard of the public interest and the accommodation of the public," yet held that it was powerless to interpose, because the defendant, as a carrier, was under no obligation, at common law, to provide warehouses for freight offered, or station-houses for passengers waiting transportation, and no such duty was imposed by the statutes authorizing companies to construct and maintain railroads "for public use in the conveyance of persons and property," and to erect and maintain all necessary and convenient buildings and stations "for the accommodation and use of their passengers, freight, and business," and because, under the statutes of New York, the proceedings and determinations of the railroad commissioners amounted to nothing more than an inquest for information, and had no effect beyond advice to the railroad company and suggestion to the legislature, and could not be judicially enforced. The court said: "As the duty sought to be imposed upon the defendant is not a specific duty prescribed by statute, either in terms or by reasonable construction, the court cannot, no matter how apparent the necessity, enforce its performance by *mandamus*. It cannot compel the erection of a station-house, nor the enlargement of one." "As to that, the

statute imports an authority only, not a command, to be availed of at the option of the company in the discretion of its directors, who are empowered by statute to manage 'its affairs,' among which must be classed the expenditure of money for station buildings or other structures for the promotion of the convenience of the public, having regard also to its own interest. With the exercise of that discretion the legislature only can interfere. No doubt, as the respondent urges, the court may by *mandamus* also act in certain cases affecting corporate matters, but only where the duty concerned is specific and plainly imposed upon the corporation." "Such is not the case before us. The grievance complained of is an obvious one, but the burden of removing it can be imposed upon the defendant only by legislation. The legislature created the corporation upon the theory that its functions should be exercised for the public benefit. It may add other regulations to those now binding it, but the court can interfere only to enforce a duty declared by law. The one presented in this case is not of that character; nor can it by any fair or reasonable construction be implied." People *v.* Railroad, 104 N. Y. 58, 66, 67.

In Com. *v.* Railroad, the Supreme Judicial Court of Massachusetts, in holding that a railroad corporation, whose charter was subject to amendment, alteration, or repeal at the pleasure of the legislature, might be required by a subsequent statute to construct a station and stop its trains at a particular place on its road, said: "If the directors of a railroad were to find it for the interest of the stockholders to refuse to carry any freight or passengers except such as they might take at one end of the road and carry entirely through to the other end, and were to refuse to establish any way stations, or do any way business for that reason, though the road passed for a long distance through a populous part of the state, this would be a case manifestly requiring and authorizing legislative interference under the clause in question; and on the same ground, if they refuse to provide reasonable accommodation for the people of any smaller locality, the legislature may reasonably alter and modify the discretionary power which the charter confers upon the directors, so as to make the duty to provide the accommodation absolute. Whether a reasonable ground for interference is presented in any particular case is for the legislature to determine, and their determination on this point must be conclusive." 103 Mass. 254, 258.

Upon the same principle, the Supreme Judicial Court of Maine compelled a railroad corporation to build a station at a specified place on its road in accordance with an order of railroad commissioners, expressly empowered by the statutes of the state to make such an order, and to apply to the court to enforce it. Laws Me. 1871, c. 204; Commissioners *v.* Portland & O. R. Co., 63 Me. 270.

In Railway Co. *v.* Commissioners, a railway company was held by Lord Chancellor SELBORNE, Lord Chief Justice COLERIDGE, and Lord Justice BRETT, in the English Court of Appeal, to be under no obliga-

tion to establish stations at any particular place or places unless it thought fit to do so, and was held bound to afford improved facilities for receiving, forwarding, and delivering passengers and goods at a station once established and used for the purpose of traffic only so far as it had been ordered to afford them by the railway commissioners, within powers expressly conferred by Act of Parliament. 6 Q. B. Div. 586, 592.

The decision in State *v.* Railroad Co., 17 Neb. 647, cited in the opinion below, proceeded upon the theory (inconsistent with the judgments of this court in Atchison, T. & S. F. R. Co. *v.* Denver & N. O. R. Co., and of the Court of Appeals of New York in People *v.* Railroad Co., above stated) that, independently of any statute requirements, a railroad corporation might be compelled to establish a station and to stop its trains at any point on the line of its road at which the court thought it reasonable that it should.

The opinions of the Supreme Court of Illinois, though going further than those of most other courts in favor of issuing writs of *mandamus* to railroad corporations, afford no countenance for granting the writ in the case at bar. In People *v.* Railroad Co., 120 Ill. 48, a *mandamus* was issued to compel the company to run all its passenger trains to a station which it had once located and used in a town made a terminal point by the charter, and which was a county seat, because the corporation had no legal power to change its location, and was required by statute to stop all trains at a county seat. In People *v.* Railroad Co., 130 Ill. 175, in which a *mandamus* was granted to compel a railroad company to establish and maintain a station in a certain town, the petition for the writ alleged specific facts making out a clear and strong case of public necessity, and also alleged that the accommodation of the public living in or near the town required, and long had required, the establishment of a station on the line of the road within the town; and the decision was that a demurrer to the petition admitted both the specific and the general allegations, and must therefore be overruled. The court, at pages 182, 183, of that case, and again in Railroad Co. *v.* People, 132 Ill. 559, 571, said: "It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers, are vested with a very broad discretion in the matter of locating, constructing, and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however, is not absolute, but is subject to the condition that it must be exercised in good faith, and with a due regard to the necessities and convenience of the public." But in the latter case the court also said: "The company cannot be compelled, on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to communities on the line of the road reasonable access to

its use. The duty to maintain or continue stations must manifestly rest upon the same principle, and a company cannot, therefore, be compelled to maintain or continue a station at a point when the welfare of the company and the community in general requires that it should be changed to some other point." Page 570. "The rule has been so often anuounced by this court that it is unnecessary to cite the cases, that a *mandamus* will never be awarded unless the right to have the thing done which is sought is clearly established." Page 572. And upon these reasons the writ was refused.

Section 691 of the Code of Washington Territory of 1881, following the common law, defines the cases in which a writ of *mandamus* may issue as "to any inferior court, corporation, board, officer, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." By the same code, in *mandamus*, as in civil actions, issues of fact may be tried by a jury; the verdict may be either general or special, and, if special, may be in answer to questions submitted by the court; and material allegations of the plaintiff not denied by the answer, as well as material allegations of new matter in the answer not denied in the replication, are deemed admitted, but a qualified admission cannot be availed of by the other party, except as qualified. Sections 103, 240, 242, 694, 696; Breemer *v.* Burgess, 2 Wash. T. 290, 296; Gildersleeve *v.* Landon, 73 N. Y. 609. The replication filed in this case, not being copied in the record sent up, may be assumed, as most favorable to the defendant in error, to have denied all allegations of new matter in the answer.

The leading facts of this case, then, as appearing by the special verdict, taken in connection with the admissions, express or implied, in the answer, are as follows: The defendant at one time stopped its trains at Yakima City, but never built a station there, and, after completing its road four miles further, to North Yakima, established a freight and passeuger station at North Yakima, which was a town laid out by the defendant on its own unimproved land, and thereupon ceased to stop its trains at Yakima City. In consequence, apparently, of this, Yakima City, which at the time of filing the petition for *mandamus* was the most important town, in population and business, in the county, rapidly dwindled, and most of its inhabitants removed to North Yakima, which at the time of the verdict had become the largest and most important town in the county. No other specific facts as to North Yakima are admitted by the parties or found by the jury. The defendant could build a station at Yakima City, but the cost of building one would be $8,000, and the expense of maintaining it $150 a month, and the earnings of the whole of this division of the defendant's road are insufficient to pay its running expenses. The special verdict includes an express finding (which appears to us to be of pure matter of fact, inferred from various circumstances, some of which are evidently not specifically found, and

to be in no sense, as assumed by the court below, a conclusion of law) that there are other stations for receiving freight and passengers between North Yakima and Pasco Junction, which furnish sufficient facilities for the country south of North Yakima, which must include Yakima City, as well as an equally explicit finding (which appears to have been wholly disregarded by the court below) that the passenger and freight traffic of the people living in the surrounding country, considering them as a community, would be better accommodated by a station at North Yakima than by one at Yakima City. It also appears of record that, after the verdict and before the district court awarded the writ of *mandamus*, the county seat was removed, pursuant to an act of the territorial legislature, from Yakima City to North Yakima.

The *mandamus* prayed for being founded on a suggestion that the defendant had distinctly manifested an intention not to perform a definite duty to the public, required of it by law, the petition was rightly presented in the name of the territory at the relation of its prosecuting attorney (Attorney-General *v.* Boston, 123 Mass. 460, 479; Code Wash. T. § 2171); and no demand upon the defendant was necessary before applying for the writ (Com. *v.* Commissioners, 37 Pa. St. 237; State *v.* Board, 38 N. J. Law, 259; Mottu *v.* Primrose, 23 Md. 482; Attorney-General *v.* Boston, 123 Mass. 460, 477).

But upon the facts found and admitted no sufficient case is made for a writ of *mandamus*, even if the court could, under any circumstances, issue such a writ for the purpose set forth in the petition. The fraudulent and wrongful intent charged against the defendant in the petition is denied in the answer, and is not found by the jury. The fact that the town of North Yakima was laid out by the defendant on its own land cannot impair the right of the inhabitants of that town, whenever they settled there, or of the people of the surrounding country, to reasonable access to the railroad. No ground is shown for requiring the defendant to maintain stations both at Yakima City and at North Yakima; there are other stations furnishing sufficient facilities for the whole country from North Yakima southward to Pasco Junction; the earnings of the division of the defendant's road between those points are insufficient to pay its running expenses; and to order the station to be removed from North Yakima to Yakima City would inconvenience a much larger part of the public than it would benefit, even at the time of the return of the verdict; and, before judgment in the district court, the legislature, recognizing that the public interest required it, made North Yakima the county seat. The question whether a *mandamus* should issue to protect the interest of the public does not depend upon a state of facts existing when the petition was filed, if that state of facts has ceased to exist when the final judgment is rendered. In this regard, as observed by Lord Chief Justice JERVIS in Railway Co. *v.* Queen, already cited, "there is a very great difference between an indictment for not

fulfilling a public duty, and a *mandamus* commanding the party liable to fulfil it." 1 El. & Bl. 878. The court will never order a railroad station to be built or maintained contrary to the public interest. T. & P. Railway *v.* Marshall, 136 U. S. 393.

For the reasons above stated, the judgment of the Supreme Court of the territory must be reversed, and the case remanded, with directions to enter judgment for the defendant, dismissing the petition; and, Washington having been admitted into the Union as a state by Act of Congress passed while this writ of error was pending in this court, the mandate will be directed as the nature of the case requires, to the Supreme Court of the state of Washington. Act Feb. 22, 1889, c. 180, §§ 22, 23 (25 St. 682, 683).

Judgment reversed, and mandate accordingly.

Mr. JUSTICE BREWER (with whom concurred Mr. Justice Field and Mr. Justice Harlan) dissenting. I dissent from the opinion and judgment in this case.

The question is not whether a railroad company can be compelled to build a depot and stop its trains at any place where are gathered two or three homes and families, nor whether courts can determine at what locality in a city or town the depot shall be placed, nor even whether, when there are two villages contiguous, the courts may determine at which of the two the company shall make its stopping-place, or compel depots at both. But the case here presented is this: A railroad company builds its road into a county, finds the county seat already established and inhabited, the largest and most prosperous town in the county, and along the line of its road for many miles. It builds its road to and through that county seat. There is no reason of a public nature why that should not be made a stopping-place. For some reason undisclosed — perhaps because that county seat will not pay to the managers a bonus, or because they seek a real-estate speculation in establishing a new town — it locates its depot on the site of a "paper" town, the title to which it holds, contiguous to this established county seat; stops only at the one, and refuses to stop at the other; and thus, for private interests, builds up a new place at the expense of the old; and for this subservience of its public duty to its private interests we are told that there is in the courts no redress; and this because Congress in chartering this Northern Pacific road did not name Yakima City as a stopping-place, and has not in terms delegated to the courts the power to interfere in the matter.

A railroad corporation has a public duty to perform as well as a private interest to subserve, and I never before believed that the courts would permit it to abandon the one to promote the other. Nowhere in its charter is in terms expressed the duty of carrying passengers and freight. Are the courts impotent to compel the performance of this duty? Is the duty of carrying passengers and

freight any more of a public duty than that of placing its depots and stopping its trains at those places which will best accommodate the public? If the state of Indiana incorporates a railroad to build a road from New Albany through Indianapolis to South Bend, and that road is built, can it be that the courts may compel the road to receive passengers and transport freight, but, in the absence of a specific direction from the legislature, are powerless to compel the road to stop its trains and build a depot at Indianapolis? I do not so belittle the power or duty of the courts.

JONES *v.* NEWPORT NEWS & MISSISSIPPI VALLEY CO.

CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, 1895.

[65 *Fed.* 736.]

ACTION by H. M. Jones against the Newport News & Mississippi Valley Company for injury to and discontinuance of a railroad switch to plaintiff's warehouse. A demurrer was sustained to that part of the petition which claimed damages for discontinuance of the switch, and plaintiff brings error.

TAFT, Circuit Judge.[1] Plaintiff bases his claim for damages — First, on the violation of an alleged common-law duty; and, second, on the breach of a contract.[2]

1. The proposition put forward on plaintiff's behalf is that when a railroad company permits a switch connection to be made between its line and the private warehouse of any person, and delivers merchandise over it for years, it becomes part of the main line of the railroad, and cannot be discontinued or removed, and this on common-law principles and without the aid of a statute. It may be safely assumed that the common law imposes no greater obligation upon a common carrier with respect to a private individual than with respect to the public. If a railroad company may exercise its discretion to discontinue a public station for passengers or a public warehouse for freight without incurring any liability or rendering itself subject to judicial control, it would seem necessarily to follow that it may exercise its discretion to establish or discontinue a private warehouse for one customer.

In Northern Pac. Ry. Co. *v.* Washington, 142 U. S. 492, it was held that a *mandamus* would not lie to compel a railroad company to establish a station and stop its trains at a town at which for a time it did stop its trains and deliver its freight.

In Com. *v.* Fitchburg R. Co., 12 Gray, 180, it was attempted to compel a railroad company to run regular passenger trains over cer-

[1] The statement of facts is omitted from the opinion. — ED.

[2] So much of the case as relates to this claim is omitted. — ED.

tain branch lines upon which they had been run for a long time, but had been discontinued because they were unremunerative. The court held that *mandamus* would not lie because the maintenance of such facilities was left to the discretion of the directors.[1]

It is true that the foregoing were cases of *mandamus*, and that the court exercises a discretion in the issuance of that writ which cannot enter into its judgment in an action for damages for a breach of duty. But the cases show that the reason why the writ cannot go is because there is no legal right of the public at common law to have a station established at any particular place along the line, or to object to a discontinuance of a station after its establishment. They make it clear that the directors have a discretion in the interest of the public and the company to decide where stations shall be, and where they shall remain, and that this discretion cannot be controlled in the absence of statutory provision. Such uncontrollable discretion is utterly inconsistent with the existence of a legal duty to maintain a station at a particular place, a breach of which can give an action for damages. If the directors have a discretion to establish and discontinue public stations, *a fortiori* have they the right to discontinue switch connections to private warehouses. The switch connection and transportation over it may seriously interfere with the convenience and safety of the public in its use of the road. It may much embarrass the general business of the company. It is peculiarly within the discretion of the directors to determine whether it does so or not. At one time in the life of the company, it may be useful and consistent with all the legitimate purposes of the company. A change of conditions, an increase in business, a necessity for travel at higher speed, may make such a connection either inconvenient or dangerous, or both. We must therefore dissent altogether from the proposition that the establishment and maintenance of a switch connection of the main line to a private warehouse for any length of time can create a duty of the railroad company at common law forever to maintain it. There is little or no authority to sustain it.

The latest of the Illinois cases which are relied upon is based upon a constitutional provision which requires all railroad companies to permit connections to be made with their track, so that the consignee of grain and any public warehouse, coal bank, or coal yard may be reached by the cars of said railroad. The supreme court of that state has held that the railroad company has a discretion to say in what particular manner the connection shall be made with its main track, but that this discretion is exhausted after the completion of the switch and its use without objection for a number of years. Railroad Co. *v.* Suffern, 129 Ill. 274. But this is very far from holding that there is any common-law liability to maintain a side track forever

[1] An extract from the opinion in Ry. *v.* Washington is omitted. The Court also cited Peo. *v.* N. Y. L. E. & W. R. R., 104 N. Y. 58; Florida, C. & P. R. R. *v.* State, 31 Fla. 482. — Ed.

after it has once been established. The other Illinois cases (Vincent *v.* Railroad Co., 49 Ill. 33; Chicago & N. W. Ry. Co. *v.* People, 56 Ill. 365) may be distinguished in the same way. They depended on statutory obligations, and were not based upon the common law, though there are some remarks in the nature of *obiter dicta* which gives color to plaintiff's contention. But it will be seen by reference to Mr. Justice GRAY'S opinion, already quoted from, that the Illinois cases have exercised greater power than most courts in controlling the discretion of railroads in the conduct of their business.

In Barre R. Co. *v.* Montpelier & W. R. Co., 61 Vt. 1, the question was one of condemnation. The law forbade one railroad company to condemn the line of another road, and the question was whether the side tracks of the railroad company, which, with the consent of the owners of the granite quarry, ran into a quarry in which a great business was done, were the line of the railroad within the meaning of the statute. It was held that they were so far as to impose obligations on and create exemptions in favor of the railroad company operating the side tracks. We may concede, for the purpose of this case, without deciding, that, as long as a railroad company permits a side track to be connected with its main line for the purpose of delivering merchandise in car-load lots to the owner of the side track, the obligation of the railroad company is the same as if it were delivering these cars at its own warehouse, on its own side track. But this we do not conceive to be inconsistent with the right of the directors of the railroad company, exercising their discretion in the conduct of the business of the company for the benefit of the public and the shareholders, to remove a side-track connection.

The recital of the facts in the petition in this case is enough to show that the switch connection of the plaintiff was one of probable or possible danger to the public using the railroad, and to justify its termination for that reason. It was made on a high fill, on the approach to a bridge across a stream, and the switch track ran on to a trestle 15 feet above the ground, and terminating in the air. Even if the discretion reposed in the directors to determine where switch connections shall be made or removed were one for the abuse of which an action for damages would lie, the petition would be defective, because it does not attempt in any way to negative the dangerous character of the switch which the facts stated certainly suggest as a good ground for the action of the company complained of. . . .

The judgment of the circuit court is affirmed, with costs.

CHICAGO AND NORTHWESTERN RAILROAD *v.* PEOPLE.

SUPREME COURT OF ILLINOIS, 1870.

[56 *Ill.* 365.]

MR. CHIEF JUSTICE LAWRENCE delivered the opinion of the Court:

This was an application for a mandamus, on the relation of the owners of the Illinois River elevator, a grain warehouse in the city of Chicago, against the Chicago and Northwestern Railroad Company. The relators seek by the writ to compel the railway company to deliver to said elevator whatever grain in bulk may be consigned to it upon the line of its road. There was a return duly made to the alternative writ, a demurrer to the return, and a judgment *pro forma* upon the demurrer, directing the issuing of a peremptory writ. From that judgment the railway company has prosecuted an appeal.

The facts as presented by the record are briefly as follows:

The company has freight and passenger depots on the west side of the north branch of the Chicago River, north of Kinzie Street, for the use, as we understand the record and the maps which are made a part thereof, of the divisions known as the Wisconsin and Milwaukie divisions of the road, running in a northwesterly direction. It also has depots on the east side of the north branch, for the use of the Galena division, running westerly. It has also a depot on the south branch near Sixteenth Street, which it reaches by a track diverging from the Galena line on the west side of the city. The map indicates a line running north from Sixteenth Street the entire length of West Water Street, but we do not understand the relators to claim their elevator should be approached by this line, as the respondent has no interest in this line south of Van Buren Street.

Under an ordinance of the city, passed August 10, 1858, the Pittsburgh, Fort Wayne, and Chicago Company, and the Chicago, St. Paul, and Fond Du Lac Company (now merged in the Chicago and Northwestern Company) constructed a track on West Water Street, from Van Buren Street north to Kinzie Street, for the purpose of forming a connection between the two roads. The Pittsburgh, Fort Wayne, and Chicago Company laid the track from Van Buren to Randolph Street, and the Chicago, St. Paul, and Fond Du Lac Company, that portion of the track from Randolph north to its own depot. These different portions of the track were, however, constructed by these two companies, by an arrangement between themselves, the precise character of which does not appear, but it is to be inferred from the record that they have a common right to the use of the track from Van Buren Street to Kinzie, and do in fact use it in common. The elevator of the relators is situated south of Randolph Street, and north of Van Buren, and is connected with the main track by a side track laid by the Pittsburgh Company, at the request and expense of the owners of the elevator, and connected at each end with the main track.

Since the 10th of August, 1866, the Chicago and Northwestern Company, in consequence of certain arrangements and agreements on and before that day entered into between the company and the owners of certain elevators, known as the Galena, Northwestern, Munn & Scott, Union, City, Munger and Armor, and Wheeler, has refused to deliver grain in bulk to any elevator except those above named. There is also in force a rule of the company, adopted in 1864, forbidding the carriage of grain in bulk, if consigned to any particular elevator in Chicago, thus reserving to itself the selection of the warehouse to which the grain should be delivered. The rule also provides that grain in bags shall be charged an additional price for transportation. This rule is still in force.

The situation of these elevators, to which alone the company will deliver grain, is as follows: The Northwestern is situated near the depot of the Wisconsin division of the road, north of Kinzie Street; the Munn & Scott on West Water Street, between the elevator of relators and Kinzie Street; the Union and City near Sixteenth Street, and approached only by the track diverging from the Galena division, on the west side of the city, already mentioned; and the others are on the east side of the north branch of the Chicago River. The Munn & Scott elevator can be reached only by the line laid on West Water Street, under the city ordinance already mentioned; and the elevator of relators is reached in the same way, being about four and a half blocks further south. The line of the Galena division of the road crosses the line on West Water Street at nearly a right angle, and thence crosses the North Branch on a bridge. It appears by the return to the writ, that a car coming into Chicago on the Galena division, in order to reach the elevator of relators, would have to be taken by a drawbridge across the river on a single track, over which the great mass of the business of the Galena division is done, then backed across the river again upon what is known as the Milwaukie division of respondent's road, thence taken to the track on West Water Street, and the cars, when unloaded, could only be taken back to the Galena division by a similar, but reversed, process, thus necessitating the passage of the drawbridge, with only a single line, four times, and, as averred in the return subjecting the company to great loss of time and pecuniary damage in the delay that would be caused to its regular trains and business on that division.

This seems so apparent that it cannot be fairly claimed the elevator of relators is upon the line of the Galena division, in any such sense as to make it obligatory upon the company to deliver upon West Water Street freight coming over that division of the road. The doctrine of the Vincent Case, in 49 Ill., was, that a railway company must deliver grain to any elevator which it had allowed, by a switch, to be connected with its own line. This rule has been reaffirmed in an opinion filed at the present term, in the case of The People ex rel. Hempstead *v.* The Chi. & Alton R. R. Company, 55 Ill. 95, but in the last case we have

also held that a railway company cannot be compelled to deliver beyond its own line simply because there are connecting tracks over which it might pass by paying track service, but which it has never made a part of its own line by use.

So far as we can judge from this record, and the maps showing the railway lines and connections, filed as a part thereof, the Wisconsin and Milwaukie divisions, running northwest, and the Galena division, running west, though belonging to the same corporation and having a common name, are, for the purposes of transportation, substantially different roads, constructed under different charters, and the track on West Water Street seems to have been laid for the convenience of the Wisconsin and Milwaukie divisions. It would be a harsh and unreasonable application of the rule announced in the Vincent Case, and a great extension of the rule beyond anything said in that case, if we were to hold that these relators could compel the company to deliver at their elevator grain which has been transported over the Galena division, merely because the delivery is physically possible, though causing great expense to the company and a great derangement of its general business, and though the track on West Water Street is not used by the company in connection with the business of the Galena division.

What we have said disposes of the case so far as relates to the delivery of grain coming over the Galena division of respondent's road. As to such grain, the mandamus should not have been awarded.

When, however, we examine the record as to the connection between the relators' elevator and the Wisconsin and Milwaukie divisions of respondent's road, we find a very different state of facts. The track on West Water Street is a direct continuation of the line of the Wisconsin and Milwaukie division; cars coming on this track from these divisions do not cross the river. The Munn & Scott elevator, to which the respondent delivers grain, is, as already stated, upon a side track connected with this track. The respondent not only uses this track to deliver grain to the Munn & Scott elevator, but it also delivers lumber and other freight upon this track, thus making it not only legally, but actually, by positive occupation, a part of its road. The respondent, in its return, admits in explicit terms, that it has an equal interest with the Pittsburgh, Fort Wayne, and Chicago Railroad in the track laid in West Water Street. It also admits its use; and the only allegation made in the return for the purpose of showing any difficulty in delivering to relators' elevator the grain consigned thereto from the Wisconsin and Milwaukie divisions, is, that those divisions connect with the line on West Water Street only by a single track, and that respondent cannot deliver bulk grain or other freight to the elevator of relators, even from those divisions, without large additional expense, caused by the loss of the use of motive power, labor of servants, and loss of use of cars, while the same are being delivered and unloaded at said elevator and brought back. As a reason for non-delivery on the ground of difficulty, this is simply frivolous. The expense caused by the loss of the

use of motive power, labor, and cars, while the latter are being taken to their place of destination and unloaded, is precisely the expense for which the company is paid its freight. It has constructed this line on West Water Street, in order to do the very work which it now, in general terms, pronounces a source of large additional expense; yet it does not find the alleged additional expense an obstacle in the way of delivering grain upon this track at the warehouse of Munn & Scott, or delivering other freights to other persons than the relators. Indeed, it seems evident, from the diagrams attached to the record, that three of the elevators, to which the respondent delivers grain, are more difficult of access than that of the relators, and three of the others have no appreciable advantage in that respect, if not placed at a decided disadvantage by the fact that they can be reached only by crossing the river.

We presume, however, from the argument that the respondent's counsel place no reliance upon this allegation of additional expense, so far as the Wisconsin and Milwaukie divisions are concerned. They rest the defence on the contracts made between the company and the elevators above named, for exclusive delivery to the latter to the extent of their capacity. This brings us to the most important question in the case. Is a contract of this character a valid excuse to the company for refusing to deliver grain to an elevator, upon its lines and not a party to the contract, to which such grain has been consigned?

In the oral argument of this case it was claimed, by counsel for the respondent, that a railway company was a mere private corporation, and that it was the right and duty of its directors to conduct its business merely with reference to the pecuniary interests of the stockholders. The printed arguments do not go to this extent, in terms, but they are colored throughout by the same idea, and in one of them we find counsel applying to the Supreme Court of the United States, and the Supreme Court of Pennsylvania, language of severe, and almost contemptuous, disparagement, because those tribunals have said that "a common carrier is in the exercise of a sort of public office." N. J. Steam Nav. Co. *v.* Merch. Bank, 6 How. 381; Sanford *v.* Railroad Co., 24 Pa. 380. If the language is not critically accurate, perhaps we can pardon these courts, when we find that substantially the same language was used by Lord HOLT, in Coggs *v.* Bernard, 2 Lord Raymond, 909, the leading case in all our books on the subject of bailments. The language of that case is, that the common carrier "exercises a public employment."

We shall engage in no discussion in regard to names. It is immaterial whether or not these corporations can be properly said to be in the exercise of "a sort of public office," or whether they are to be styled private, or *quasi* public corporations. Certain it is, that they owe some important duties to the public, and it only concerns us now to ascertain the extent of these duties as regards the case made upon this record.

It is admitted by respondent's counsel that railway companies are

common carriers, though even that admission is somewhat grudgingly made. Regarded merely as a common carrier at common law, and independently of any obligations imposed by the acceptance of its charter, it would owe important duties to the public, from which it could not release itself, except with the consent of every person who might call upon it to perform them. Among these duties, as well defined and settled as anything in the law, was the obligation to receive and carry goods for all persons alike, without injurious discrimination as to terms, and to deliver them in safety to the consignee, unless prevented by the act of God or the public enemy. These obligations grew out of the relation voluntarily assumed by the carrier toward the public, and the requirements of public policy, and so important have they been deemed that eminent judges have often expressed their regret that common carriers have ever been permitted to vary their common-law liability, even by a special contract with the owner of the goods.

Regarded, then, merely as a common carrier at common law, the respondent should not be permitted to say it will deliver goods at the warehouse of A and B, but will not deliver at the warehouse of C, the latter presenting equal facilities for the discharge of freight, and being accessible on respondent's line.

But railway companies may well be regarded as under a higher obligation, if that were possible, than that imposed by the common law, to discharge their duties to the public as common carriers fairly and impartially. As has been said by other courts, the State has endowed them with something of its own sovereignty, in giving them the right of eminent domain. By virtue of this power they take the lands of the citizen against his will, and can, if need be, demolish his house. Is it supposed these great powers were granted merely for the private gain of the corporators? On the contrary, we all know the companies were created for the public good.

The object of the legislature was to add to the means of travel and commerce. If, then, a common carrier at common law came under obligations to the public from which he could not discharge himself at his own volition, still less should a railway company be permitted to do so, when it was created for the public benefit, and has received from the public such extraordinary privileges. Railway charters not only give a perpetual existence and great power, but they have been constantly recognized by the courts of this country as contracts between the companies and the State, imposing reciprocal obligations.

The courts have always been, and we trust always will be, ready to protect these companies in their chartered rights, but, on the other hand, we should be equally ready to insist that they perform faithfully to the public those duties which were the object of their chartered powers.

We are not, of course, to be understood as saying or intimating that the legislature, or the courts, may require from a railway company the performance of any and all acts that might redound to the public benefit,

without reference to the pecuniary welfare of the company itself. We hold simply that it must perform all those duties of a common carrier to which it knew it would be liable when it sought and obtained its charter, and the fact that the public has bestowed upon it extraordinary powers is but an additional reason for holding it to a complete performance of its obligations.

The duty sought to be enforced in this proceeding is the delivery of grain in bulk to the warehouse to which it is consigned, such warehouse being on the line of the respondent's road, with facilities for its delivery equal to those of the other warehouses at which the company does deliver, and the carriage of grain in bulk being a part of its regular business. This, then, is the precise question decided in the Vincent Case, in 49 Ill., and it is unnecessary to repeat what was there said. We may remark, however, that, as the argument of counsel necessarily brought that case under review, and as it was decided before the reorganization of this court under the new constitution, the court as now constituted has re-examined that decision, and fully concurs therein. That case is really decisive of the present, so far as respects grain transported on the Wisconsin and Milwaukie divisions of respondent's road. The only difference between this and the Vincent Case is in the existence of the contract for exclusive delivery to the favored warehouses, and this contract can have no effect when set up against a person not a party to it, as an excuse for not performing toward such person those duties of a common carrier prescribed by the common law, and declared by the statute of the State.

The contract in question is peculiarly objectionable in its character, and peculiarly defiant of the obligations of the respondent to the public as a common carrier. If the principle implied in it were conceded, the railway companies of the State might make similar contracts with individuals at every important point upon their lines, and in regard to other articles of commerce besides grain, and thus subject the business of the State almost wholly to their control, as a means of their own emolument. Instead of making a contract with several elevators, as in the present case, each road that enters Chicago might contract with one alone, and thus give to the owner of such elevator an absolute and complete monopoly in the handling of all the grain that might be transported over such road. So, too, at every important town in the interior, each road might contract that all the lumber carried by it should be consigned to a particular yard. How injurious to the public would be the creation of such a system of organized monopolies in the most important articles of commerce, claiming existence under a perpetual charter from the State, and, by the sacredness of such charter, claiming also to set the legislative will itself at defiance, it is hardly worth while to speculate. It would be difficult to exaggerate the evil of which such a system would be the cause, when fully developed, and managed by unscrupulous hands.

Can it be seriously doubted whether a contract, involving such a

principle, and such results, is in conflict with the duties which the company owes to the public as a common carrier? The fact that a contract has been made is really of no moment, because, if the company can bind the public by a contract of this sort, it can do the same thing by a mere regulation of its own, and say to these relators that it will not deliver at their warehouse the grain consigned to them, because it prefers to deliver it elsewhere. The contract, if vicious in itself, so far from excusing the road, only shows that the policy of delivering grain exclusively at its chosen warehouses is a deliberate policy, to be followed for a term of years, during which these contracts run.

It is, however, urged very strenuously by counsel for the respondent, that a common carrier, in the absence of contract, is bound to carry and deliver only according to the custom and usage of his business; that it depends upon himself to establish such custom and usage; and that the respondent, never having held itself out as a carrier of grain in bulk, except upon the condition that it may itself choose the consignee, this has become the custom and usage of its business, and it cannot be required to go beyond this limit. In answer to this position, the fact that the respondent has derived its life and powers from the people, through the legislature, comes in with controlling force. Admit, if the respondent were a private association, which had established a line of wagons, for the purpose of carrying grain from the Wisconsin boundary to the elevator of Munn & Scott in Chicago, and had never offered to carry or deliver it elsewhere, that it could not be compelled to depart from the custom or usage of its trade. Still the admission does not aid the respondent in this case. In the case supposed, the carrier would establish the terminal points of his route at his own discretion, and could change them as his interests might demand. He offers himself to the public only as a common carrier to that extent, and he can abandon his first line and adopt another at his own volition. If he should abandon it, and, instead of offering to carry grain only to the elevator of Munn & Scott, should offer to carry it generally to Chicago, then he would clearly be obliged to deliver it to any consignee in Chicago, to whom it might be sent and to whom it could be delivered, the place of delivery being upon his line of carriage.

In the case before us, admitting the position of counsel that a common carrier establishes his own line and terminal points, the question arises, at what time and how does a railway company establish them? We answer, when it accepts from the legislature the charter which gives it life, and by virtue of such acceptance. That is the point of time at which its obligations begin. It is then that it holds itself out to the world as a common carrier, whose business will begin as soon as the road is constructed upon the line which the charter has fixed. Suppose this respondent had asked from the legislature a charter authorizing it to carry grain in bulk to be delivered only at the elevator of Munn & Scott, and nowhere else in the city of Chicago. Can any one suppose such charter would have been granted? The supposition is

preposterous. But, instead of a charter making a particular elevator the terminus and place of delivery, the legislature granted one which made the city of Chicago itself the terminus, and when this charter was accepted there at once arose, on the part of the respondent, the corresponding obligation to deliver grain at any point within the city of Chicago, upon its lines, with suitable accommodations for receiving it, to which such grain might be consigned. Perhaps grain in bulk was not then carried in cars, and elevators may not have been largely introduced. But the charter was granted to promote the conveniences of commerce, and it is the constant duty of the respondent to adapt its agencies to that end. When these elevators were erected in Chicago, to which the respondent's line extended, it could only carry out the obligations of its charter by receiving and delivering to each elevator whatever grain might be consigned to it, and it is idle to say such obligation can be evaded by the claim that such delivery has not been the custom or usage of respondent. It can be permitted to establish no custom inconsistent with the spirit and object of its charter.

It is claimed by counsel that the charter of respondent authorizes it to make such contracts and regulations as might be necessary in the transaction of its business. But certainly we cannot suppose the legislature intended to authorize the making of such rules or contracts as would defeat the very object it had in view in granting the charter. The company can make such rules and contracts as it pleases, not inconsistent with its duties as a common carrier, but it can go no further, and any general language which its charter may contain must necessarily be construed with that limitation. In the case of The City of Chicago *v.* Rumpff, 45 Ill. 94, this court held a clause in the charter, giving the common council the right to control and regulate the business of slaughtering animals, did not authorize the city to create a monopoly of the business, under pretence of regulating and controlling it.

It is unnecessary to speak particularly of the rule adopted by the company in reference to the transportation of grain. What we have said in regard to the contract applies equally to the rule.

The principle that a railroad company can make no injurious or arbitrary discrimination between individuals in its dealings with the public, not only commends itself to our reason and sense of justice, but is sustained by adjudged cases. In England, a contract which admitted to the door of a station, within the yard of a railway company, a certain omnibus, and excluded another omnibus, was held void. Marriot *v.* L. & S. W. R. R. Co., 1 C. B. (N. S.), 498.

In Gaston *v.* Bristol & Exeter Railroad Company, 6 C. B. (N. S.) 641, it was held, that a contract with certain ironmongers, to carry their freight for a less price than that charged the public, was illegal, no good reason for the discrimination being shown.

In Crouch *v.* The L. & N. W. R. Co., 14 C. B. 254, it was held a railway company could not make a regulation for the conveyance of goods which, in practice, affected one individual only.

In Sandford *v.* Railroad Company, 24 Pa. 382, the court held that the power given in the charter of a railway company to regulate the transportation of the road did not give the right to grant exclusive privileges to a particular express company. The court say, "If the company possessed this power, it might build up one set of men and destroy others; advance one kind of business and break down another, and make even religion and politics the tests in the distribution of its favors. The rights of the people are not subject to any such corporate control."

We refer also to Rogers' Locomotive Works *v.* Erie R. R. Co., 5 Green, 380, and State *v.* Hartford & N. H. R. Co., 29 Conn. 538.

It is insisted by counsel for the respondent that, even if the relators have just cause of complaint, they cannot resort to the writ of mandamus. We are of opinion, however, that they can have an adequate remedy in no other way, and that the writ will therefore lie.

The judgment of the court below awarding a peremptory mandamus must be reversed, because it applies to the Galena division of respondent's road, as well as to the Wisconsin and Milwaukie divisions. If it had applied only to the latter, we should have affirmed the judgment. The parties have stipulated that, in case of reversal, the case shall be remanded, with leave to the relators to traverse the return. We therefore make no final order, but remand the case, with leave to both parties to amend their pleadings, if desired, in view of what has been said in this opinion. *Judgment reversed.*

COE *v.* LOUISVILLE & NASHVILLE RAILROAD.

CIRCUIT COURT OF THE UNITED STATES, MIDDLE DISTRICT OF TENNESSEE, 1880.

[3 *Fed.* 775.]

BAXTER, C. J. The defendant corporation owns the Louisville & Nashville Railroad, and, in virtue of its purchase of the southeastern lease of the Nashville & Decatur, and ownership of a majority of the capital stock of the Nashville, Chattanooga & St. Louis Railway Company, controls every railroad centering at Nashville. It has, for many years past, been engaged in carrying such freights as are usually transported by rail, including live stock. Twelve or more years since, when it needed facilities for loading and delivering live stock, the complainants bought a lot contiguous to defendant's depot, in Nashville, at $14,000, and fitted it up as a stock yard, at a cost of $16,000 more. There was no express contract between complainants and defendant in relation to the matter. But it is clear that it was a convenience to defendant's business. By the permission or acquiescence of defendant complainants' yard was connected with defendant's road by appropriate stock gaps and pens, which have been in use by both parties for more

than twelve years; but on the twenty-fifth of March, 1880, the defendant and the Nashville, Chattanooga & St. Louis Railway Company entered into a contract with the Union Stock Yard Company, whereby the said stock-yard company stipulated "to erect, maintain, and keep in good order," etc., "a stock yard in the city of Nashville, on the line of the Nashville, Chattanooga & St. Louis Railway," outside the city limits, and more than a mile from complainants' yard. And the parties of the first part — the railroad companies — among other things, agreed that "they would establish no other stock yard in Nashville," and that they would "deliver, and cause to be delivered, to said party of the second part all live stock shipped over the roads of the parties of the first part, and consigned to the city of Nashville; the parties of the first part hereby agreeing to make this stock yard of the party of the second part their stock depot for said city, and will not deliver at any other point or points of the city, and agree to deliver all live stock shipped to said city of Nashville at the yards of the party of the second part."

In furtherance of this contract, Edward B. Stahlman, defendant's traffic manager, and owner of $5,000 of the capital stock of the stock-yard company, issued the following order, addressed to defendant's agent, dated July 10, 1880: "On the fifteenth inst. there will be opened and ready for business the stock yards erected by the Union Stock Yard Company, at Nashville, Tenn. These yards have every facility for the proper handling and care of live stock, and will be constituted our stock delivery and forwarding depots. Live stock from and after that date consigned to Nashville proper, or destined to any points over our line via Nashville, should be way-billed care of the Union Stock Yards;" and on the twenty-fourth of the same month James Geddes, defendant's superintendent, supplemented the foregoing order with a notice to complainants in the following words: "I am directed by Mr. De Funiak, general manager, to notify you that after the last day of July, 1880, no delivery of stock will be made to you at our platform here, Nashville depot," to wit, the platform, gaps, and pens communicating with complainants' yard, where the defendant had heretofore delivered to them.

Complainants remonstrated against this threatened discrimination against them and their business; but, being unable to induce any change in defendant's avowed policy, filed their bill in which they pray for an injunction to restrain "defendant's agents and officers and servants from interfering with or in any manner disturbing the enjoyment and facilities now accorded to complainants by the said defendant upon its lines of railway, for the transaction of business now carried on by the complainants, and especially from excluding or inhibiting persons from consigning stock to complainants, and from refusing to receive and transport stock from complainants' yard, and from interfering with or in any way disturbing the business of the complainants, and from refusing to permit the complainants to continue their business on the same terms as heretofore." The injunction asked for is both inhibitory and man-

datory; it seeks to prohibit the doing of threatened and alleged wrongful acts, and to compel defendant to continue the facilities and accommodations heretofore accorded by defendant to complainants; and the question is, are complainants entitled, preliminarily, to the relief prayed for, or any part of it?

The facts suggest the very important inquiry, how far railroads, called into being to subserve the public, can be lawfully manipulated by those who control them to advance, incidentally, their own private interests, or depress the business of particular individuals or localities, for the benefit of other persons or communities. As common carriers they are by law bound to receive, transport, and deliver freights offered for that purpose, in accordance with the usual course of business. The delivery, when practicable, must be to the consignee. But the rule which requires common carriers by land to deliver to the consignee personally at his place of business, has been somewhat relaxed in favor of said roads on the ground that they have no means of delivering beyond their lines; but it was held in Vincent *v.* The Chicago & Alton R. Co., 49 Ill. 33, that at common law, and independent of the statute relied on in the argument, that in cases where a shipment of grain was made to a party having a warehouse on the line of the carrying road, who had provided a connecting track and was ready to receive it, it would be the duty of the railroad company to make a personal delivery of the grain to the consignee at his warehouse; because, say the court, "the common-law rule must be applied, as the necessity of its relaxation" did not exist.

This rule is just and convenient, and necessary to an expeditious and economical delivery of freights. It has regard to their proper classification, and to the circumstances of the particular case. Under it articles susceptible of easy transfer may be delivered at a general delivery depot provided for the purpose. But live stock, coal, ore, grain in bulk, marble, etc., do not belong to this class. For these some other and more appropriate mode of delivery must be provided. Hence it is that persons engaged in receiving and forwarding live stock, manufacturers consuming large quantities of heavy material, dealers in coal, and grain merchants, receiving, storing, and forwarding grain in bulk, who are dependent on railroad transportation, usually select locations for the prosecution of their business contiguous to railroads, where they can have the benefit of side connections over which their freight can be delivered in bulk at their private depots; and may a railroad company, after encouraging investments in mills, furnaces, and other productive manufacturing enterprises on its line of road, refuse to make personal delivery of the material necessary to their business, at their depots, erected for the purpose, and require them to accept delivery a mile distant, at the depot of and through a rival and competing establishment? Or may such railroad company establish a "Union Coal Yard" in this city, and constitute it its depot for the delivery of coal, and thus impose on all the coal dealers in the city, with whom it has side connec-

tions, the labor, expense, and delay of carting their coal supplies from such general delivery to their respective yards? Or may such railroad company, in like manner, discriminate between grain elevators in the same place, — constitute one elevator its depot for the delivery of grain, and force competing interests to receive from and transfer the grain consigned to them through such selected and favored channel?

If railroad corporations possess such right, they can destroy a refractory manufacturer, exterminate, or very materially cripple competition, and in large measure monopolize and control these several branches of useful commerce, and dictate such terms as avarice may suggest. We think they possess no such power to kill and make alive. Impartiality in serving their patrons is an imperative obligation of all railroad companies; equality of accommodations in the use of railroads is the legal right of everybody. The principle is founded in justice and necessity, and has been uniformly recognized and enforced by the courts. A contrary idea would concede to railroad companies a dangerous discretion, and inevitably lead to intolerable abuses. It would, to a limited extent, make them masters instead of the servants of the public. By an unjust exercise of such a power they could destroy the business of one man and build up that of another, punish an enemy and reward a friend, depress the interests of one community for the benefit of its rival, and so manipulate their roads as to compel concessions and secure incidental profits to which they have no legal or moral right whatever.

The case in hand is but a sample of what might be done by these corporations if the power claimed in this case is possessed by them. Complainants' stock yard was purchased and fitted up at a heavy outlay of money. It was, at the time, a necessity to defendant's business. By the express agreement or tacit understanding of the parties suitable connections for receiving and delivering stock were made, of which the defendant availed itself for twelve years. But, after thus accepting the benefits of complainants' expenditures, the defendant proposes to sever its connections, withhold further accommodations, decline to receive from or deliver stock at complainants' yard, concentrate its patronage on the Union Stock Yard Company, require all consignors to way-bill their stock to the care of said favored company, and, by this invidious discrimination, compel complainants to carry on their trade through a rival yard, or else abandon their established and lucrative business. The execution of defendant's threat would destroy complainants' business, depreciate their property, and deprive the public of the protection against exorbitant charges which legitimate competition, conducted on equal terms, always insures. Complainants' yard is on defendant's road; it furnishes every needed facility; was purchased and improved in the belief that they would receive the same measure of accommodation extended to others sustaining the same relation to defendant; defendant can receive and discharge stock at complainants' yard as easily and cheaply as it can at the Union Stock Yard Company's yards. Such

delivery is both practicable and convenient, and it is, we think, its legal duty, under the facts of this case, to do so.

But defendant, protesting that the proposed discrimination in favor of the Union Stock Yard Company would, if executed, constitute no wrong of which complainants ought justly to complain, contends, — *first*, that complainants, even supposing the law to be otherwise, have an adequate remedy at law, and therefore cannot have any relief from a court of chancery; and, *second*, that if a chancery court may entertain jurisdiction, no relief in the nature of a mandatory order to compel defendant to continue accommodations to the complainants ought to be made until the final hearing. If such is the law it must be so administered. But we do not concur in this interpretation of the adjudications. Those cited in argument are not, we think, applicable to the facts of this case. Complainants could, in the event defendant carries its threat into execution and withholds the accommodations claimed as their right, sue at law and recover damages for the wrong to be thus inflicted. But they could not, through any process used by courts of law, compel defendant to specifically perform its legal duty in the premises. And this imperfect redress could only be attained through a multiplicity of suits, to be prosecuted at great expense of money and labor; and then, after reaching the end through the harassing delays incident to such litigation, complainants' business would be destroyed, and the Union Stock Yard Company, born of favoritism and fostered by an illegal and unjust discrimination, would be secure in its monopoly. Here an adequate remedy can be administered and a multiplicity of suits avoided.

One other point remains to be noticed. Ought a mandatory order to issue upon this preliminary application? Clearly not, unless the urgency of the case demands it, and the rights of the parties are free from reasonable doubt. The duty which the complainants seek by this suit to enforce is one imposed and defined by law — a duty of which the court has judicial knowledge. The injunction compelling its performance, pending this controversy, can do defendant no harm; whereas a suspension of accommodations would work inevitable and irreparable mischief to complainants. The injunction prayed for will, therefore, be issued.

ATCHISON, TOPEKA AND SANTA FÉ RAILROAD *v.* DENVER AND NEW ORLEANS RAILROAD.

SUPREME COURT OF THE UNITED STATES. 1884.

[110 *U. S.* 667.]

THIS was a bill in equity filed by the Denver & New Orleans Railroad Company, a Colorado corporation, owning and operating a railroad in that State between Denver and Pueblo, a distance of about

one hundred and twenty-five miles, against the Atchison, Topeka & Santa Fé Railroad Company, a Kansas corporation, owning and operating a railroad in that State from the Missouri River, at Kansas City, westerly to the Colorado State line, and also operating from there, under a lease, a road in Colorado from the State line to Pueblo, built by the Pueblo & Arkansas Valley Railroad Company, a Colorado corporation. The two roads so operated by the Atchison, Topeka & Santa Fé Company formed a continuous line of communication from Kansas City to Pueblo, about six hundred and thirty-four miles. The general purpose of the suit was to compel the Atchison, Topeka & Santa Fé Company to unite with the Denver & New Orleans Company in forming a through line of railroad transportation to and from Denver over the Denver & New Orleans road, with all the privileges as to exchange of business, division of rates, sale of tickets, issue of bills of lading, checking of baggage and interchange of cars, that were or might be customary with connecting roads, or that were or might be granted to the Denver & Rio Grande Railroad Company, another Colorado corporation, also owning and operating a road parallel to that of the Denver & New Orleans Company between Denver and Pueblo, or to any other railroad company competing with the Denver & New Orleans for Denver business.

It appeared that when the Atchison, Topeka & Santa Fé Company reached Pueblo with its line it had no connection of its own with Denver. The Denver & Rio Grande road was built and running between Denver and Pueblo, but the gauge of its track was different from that of the Atchison, Topeka & Santa Fé. Other companies occupying different routes had at the time substantially the control of the transportation of passengers and freight between the Missouri River and Denver. The Atchison, Topeka & Santa Fé Company, being desirous of competing for this business, entered into an arrangement, as early as 1879, with the Denver & Rio Grande Company for the formation of a through line of transportation for that purpose. By this arrangement a third rail was to be put down on the track of the Denver & Rio Grande road, so as to admit of the passage of cars continuously over both roads, and terms were agreed on for doing the business and for the division of rates. The object of the parties was to establish a new line, which could be worked with rapidity and economy, in competition with the old ones.[1]

In 1882 the Denver & New Orleans Company completed its road between Denver and Pueblo, and connected its track with that of the Atchison, Topeka & Santa Fé, in Pueblo, twelve or fifteen hundred feet easterly from the junction of the Denver & Rio Grande, and about three-quarters of a mile from the union depot at which the Atchison, Topeka & Santa Fé and the Denver & Rio Grande interchanged their business, and where each stopped its trains regularly to take on and let off passengers and receive and deliver freight. The Denver &

[1] Part of the statement of facts is omitted. — Ed.

New Orleans Company erected, at its junction with the Atchison, Topeka & Santa Fé, platforms and other accommodations for the interchange of business, and before this suit was begun the general superintendent of the Denver & New Orleans Company made a request in writing of the general manager of the Atchison, Topeka & Santa Fé, as follows:

"That through bills of lading be given via your line and ours, and that you allow all freight consigned via D. & N. O. R. R. to be delivered this company at point of junction, and on such terms as exist between your road and any other line or lines; that you allow your cars, or cars of any foreign line, destined for points reached by the D. & N. O. R. R., to be delivered to this company and hauled to destination in same manner as interchanged with any other line. That you allow tickets to be placed on sale between points on line of D. & N. O. R. R. and those on line of A. T. & S. F. R. R., or reached by either line; that a system of through checking of baggage be adopted; that a transfer of U. S. mail be made at point of junction. In matter of settlements between the two companies for earnings and charges due, we will settle daily on delivery of freight to this line; for mileage due for car service, and for amounts due for tickets interchanged, we agree to settle monthly, or in any other manner adopted by your line, or as is customary between railroads in such settlements."

This request was refused, and the Atchison, Topeka & Santa Fé Company continued its through business with the Denver & Rio Grande as before, but declined to receive or deliver freight or passengers at the junction of the Denver & New Orleans road, or to give or take through bills of lading, or to sell or receive through tickets, or to check baggage over that line. All passengers or freight coming from or destined for that line were taken or delivered at the regular depot of the Atchison, Topeka & Santa Fé Company in Pueblo, and the prices charged were according to the regular rates to and from that point, which were more than the Atchison, Topeka & Santa Fé received on a division of through rates to and from Denver under its arrangement with the Denver & Rio Grande Company. . . .

Upon this state of facts the Circuit Court entered a decree requiring the Atchison, Topeka & Santa Fé Company to stop all its passenger trains at the platform built by the Denver & New Orleans Company where the two roads joined, and to remain there long enough to take on and let off passengers with safety, and to receive and deliver express matter and the mails. It also required the Atchison, Topeka & Sante Fé Company to keep an agent there, to sell tickets, check baggage, and bill freight. All freight trains were to be stopped at the same place whenever there was freight to be taken on or delivered, if proper notice was given. While the Atchison, Topeka & Santa Fé Company was not required to issue or recognize through bills of lading embracing the Denver & New Orleans road in the route, or to sell or recognize through tickets of the same character, or to check baggage

in connection with that road, it was required to carry freight and passengers going to or coming from that road at the same price it would receive if the passenger or freight were carried to or from the same point upon a through ticket or through bill of lading issued under any arrangement with the Denver & Rio Grande Company or any other competitor of the Denver & New Orleans Company for business. In short, the decree, as entered, establishes in detail rules and regulations for the working of the Atchison, Topeka & Santa Fé and Denver & New Orleans roads, in connection with each other as a connecting through line, and, in effect, requires the Atchison, Topeka & Santa Fé Company to place the Denver & New Orleans Company on an equal footing as to the interchange of business with the most favored of the competitors of that company, both as to prices and facilities, except in respect to the issue of through bills of lading, through checks for baggage, through tickets, and perhaps the compulsory interchange of cars.

From this decree both companies appealed; the Atchison, Topeka & Santa Fé Company because the bill was not dismissed; and the Denver & New Orleans Company because the decree did not fix the rates to be charged by the Atchison, Topeka & Santa Fé Company for freight and passengers transported by it in connection with the Denver & New Orleans, or make a specific division and apportionment of through rates between the two companies, and because it did not require the issue of through tickets and through bills of lading, and the through checking of baggage.

Mr. H. C. Thatcher, *Mr. Charles E. Gast*, *Mr. George R. Peck*, and *Mr. William M. Evarts* for the Atchison, Topeka & Santa Fé Railroad Company.

Mr. E. T. Wells for the Denver & New Orleans Railroad Company.

Mr. Chief Justice Waite delivered the opinion of the court.[1] After reciting the facts in the foregoing language he continued:

The case has been presented by counsel in two aspects:

1. In view of the requirements of the Constitution of Colorado alone; and

2. In view of the constitutional and common-law obligations of railroad companies in Colorado as common carriers.

We will first consider the requirements of the Constitution; and here it may be premised that sec. 6 of art. 15 imposes no greater obligations upon the company than the common law would have imposed without it. Every common carrier must carry for all to the extent of his capacity, without undue or unreasonable discrimination either in charges or facilities. The Constitution has taken from the legislature the power of abolishing this rule as applied to railroad companies.

So in sec. 4 there is nothing specially important to the present inquiry except the last sentence: "Every railroad company shall have the right with its road to intersect, connect with, or cross any

[1] Part of the opinion is omitted. — Ed.

other railroad." Railroad companies are created to serve the public as carriers for hire, and their obligations to the public are such as the law attaches to that service. The only exclusively constitutional question in the case is, therefore, whether the right of one railroad company to connect its road with that of another company, which has been made part of the fundamental law of the State, implies more than a mechanical union of the tracks of the roads so as to admit of the convenient passage of cars from one to the other. The claim on the part of the Denver & New Orleans Company is that the right to connect the roads includes the right of business intercourse between the two companies, such as is customary on roads forming a continuous line, and that if the companies fail or refuse to agree upon the terms of their intercourse a court of equity may, in the absence of statutory regulations, determine what the terms shall be. Such appears to have been the opinion of the Circuit Court, and accordingly in its decree a compulsory business connection was established between the two companies, and rules were laid down for the government of their conduct towards each other in this new relation. In other words, the court has made an arrangement for the business intercourse of these companies such as, in its opinion, they ought in law to have made for themselves.

There is here no question as to how or where the physical connection of the roads shall be made, for that has already been done at the place, and in the way, decided upon by the Denver & New Orleans Company for itself, and the Atchison, Topeka & Santa Fé Company does not ask to have it changed. The point in dispute upon this branch of the case, therefore, is whether, under the Constitution of Colorado, the Denver & New Orleans Company has a constitutional right, which a court of chancery can enforce by a decree for specific performance, to form the same business connection, and make the same traffic arrangement, with the Atchison, Topeka & Santa Fé Company as that company grants to, or makes with, any competing company operating a connected road.

The right secured by the Constitution is that of a connection of one road with another, and the language used to describe the grant is strikingly like that of sec. 23 of the charter of the Baltimore & Ohio Railroad Company, given by Maryland on the 28th of February, 1827, Laws of Maryland, 1826, c. 123, which is in these words:

"That full right and privilege is hereby reserved to the citizens of this State, or any company hereafter to be incorporated under the authority of this State, to connect with the road hereby provided for, any other railroad leading from the main route, to any other part or parts of the State."

At the time this charter was granted the idea prevailed that a railroad could be used like a public highway by all who chose to put carriages thereon, subject only to the payment of tolls, and to reasonable regulations as to the manner of doing business, *Lake Sup. & Miss. R. R. Co.* v. *United States*, 93 U. S. 442; but that the word "connect," as

here used, was not supposed to mean anything more than a mechanical union of the tracks is apparent from the fact that when afterwards, on the 9th of March, 1833, authority was given the owners of certain factories to connect roads from their factories with the Washington branch of the Baltimore & Ohio Company, and to erect depots at the junctions, it was in express terms made "the duty of the company to take from and deliver at said depot any produce, merchandise, or manufactures, or other articles whatsoever, which they (the factory owners) may require to be transported on said road." Maryland Laws of 1832, c. 175, sec. 16. The charter of the Baltimore & Ohio Company was one of the earliest ever granted in the United States, and while from the beginning it was common in most of the States to provide in some form by charters for a connection of one railroad with another, we have not had our attention called to a single case where, if more than a connection of tracks was required, the additional requirement was not distinctly stated and defined by the legislature.

Legislation regarding the duties of connected roads because of their connection is to be found in many of the States, and it began at a very early day in the history of railroad construction. As long ago as 1842 a general statute upon the subject was passed in Maine, Stats. of Maine, 1842, c. 9; and in 1854, c. 93, a tribunal was established for determining upon the "terms of connection" and "the rates at which passengers and merchandise coming from the one shall be transported over the other," in case the companies themselves failed to agree. Other States have made different provisions, and as railroads have increased in number, and their relations have become more and more complicated, statutory regulations have been more frequently adopted, and with greater particularity in matters of detail. Much litigation has grown out of controversies between connected roads as to their respective rights, but we have found no case in which, without legislative regulation, a simple connection of tracks has been held to establish any contract or business relation between the companies. . . .

To our minds it is clear that the constitutional right in Colorado to connect railroad with railroad does not itself imply the right of connecting business with business. The railroad companies are not to be connected, but their roads. A connection of roads may make a connection in business convenient and desirable, but the one does not necessarily carry with it the other. The language of the Constitution is that railroads may "intersect, connect with, or cross" each other. This clearly applies to the road as a physical structure, not to the corporation or its business.

This brings us to the consideration of the second branch of the case, to wit, the relative rights of the two companies at common law and under the Constitution, as owners of connected roads, it being conceded that there are no statutory regulations applicable to the subject.

The Constitution expressly provides:

1. That all shall have equal rights in the transportation of persons and property;

2. That there shall not be any undue or unreasonable discrimination in charges or facilities; and

3. That preferences shall not be given in furnishing cars or motive power.

It does not expressly provide:

1. That the trains of one connected road shall stop for the exchange of business at the junction with the other; nor

2. That companies owning connected roads shall unite in forming a through line for continuous business, or haul each other's cars; nor

3. That local rates on a through line shall be the same to one connected road not in the line as the through rates are to another which is; nor

4. That if one company refuses to agree with another owning a connected road to form a through line or to do a connecting business a court of chancery may order that such a business be done and fix the terms.

The question, then, is whether these rights or any of them are implied either at common law or from the Constitution.

At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the help of others, than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associates for doing his own work.

The Atchison, Topeka & Santa Fé Company, as the lessee of the Pueblo & Arkansas Valley Railroad, has the statutory right to establish its own stations and to regulate the time and manner in which it will carry persons and property and the price to be paid therefor. As to all these matters, it is undoubtedly subject to the power of legislative regulation, but in the absence of regulation it owes only such duties to the public, or to individuals, associations, or corporations, as the common law, or some custom having the force of law, has established for the government of those in its condition. As has already been shown, the Constitution of Colorado gave to every railroad company in the State the right to a mechanical union of its road with that of any other company in the State, but no more. The legislature has not seen fit to extend this right, as it undoubtedly may, and consequently the Denver & New Orleans Company comes to the Atchison, Topeko & Santa Fé Company just as any other customer does, and

with no more rights. It has established its junction and provided itself with the means of transacting its business at that place, but as yet it has no legislative authority to compel the other company to adopt that station or to establish an agency to do business there. So far as statutory regulations are concerned, if it wishes to use the Atchison, Topeka & Santa Fé road for business, it must go to the place where that company takes on and lets off passengers or property for others. It has as a railroad company no statutory or constitutional privileges in this particular over other persons, associations, or corporations. It saw fit to establish its junction at a place away from the station which the Atchison, Topeka & Santa Fé Company had, in the exercise of its legal discretion, located for its own convenience and that of the public. It does not now ask to enter that station with its tracks or to interchange business at that place, but to compel the Atchison, Topeka & Santa Fé Company to stop at its station and transact a connecting business there. No statute requires that connected roads shall adopt joint stations, or that one railroad company shall stop at or make use of the station of another. Each company in the State has the legal right to locate its own stations, and so far as statutory regulations are concerned, is not required to use any other.

A railroad company is prohibited, both by the common law and by the Constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road; but that does not necessarily imply that it must stop at the junction of one and interchange business there, because it has established joint depot accommodations and provided facilities for doing a connecting business with another company at another place. A station may be established for the special accommodation of a particular customer; but we have never heard it claimed that every other customer could, by a suit in equity, in the absence of a statutory or contract right, compel the company to establish a like station for his special accommodation at some other place. Such matters are, and always have been, proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for injustice of that kind can only be obtained from the legislature. A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation.

In the present case, the Atchison, Topeka & Santa Fé and the Denver & Rio Grande Companies formed their business connection and established their junction or joint station long before the Denver & New Orleans road was built. The Denver & New Orleans Company saw fit to make its junction with the Atchison, Topeka & Santa Fé Company at a different place. Under these circumstances, to hold that, if the Atchison, Topeka & Santa Fé continued to stop at its old station, after the Denver & New Orleans was built, a refusal to stop

at the junction of the Denver & New Orleans, was an unreasonable discrimination as to facilities in favor of the Denver & Rio Grande Company, and against the Denver & New Orleans, would be in effect to declare that every railroad company which forces a connection of its road with that of another company has a right, under the Constitution or at the common law, to require the company with which it connects to do a connecting business at the junction, if it does a similar business with any other company under any other circumstances. Such, we think, is not the law. It may be made so by the legislative department of the government, but it does not follow, as a necessary consequence, from the constitutional right of a mechanical union of tracks, or the constitutional prohibition against undue or unreasonable discrimination in facilities.

This necessarily disposes of the question of a continuous business, or a through line for passengers or freight, including through tickets, through bills of lading, through checking of baggage, and the like. Such a business does not necessarily follow from a connection of tracks. The connection may enable the companies to do such a business conveniently when it is established, but it does not of itself establish the business. The legislature cannot take away the right to a physical union of two roads, but whether a connecting business shall be done over them after the union is made depends on legislative regulation, or contract obligation. An interchange of cars, or the hauling by one company of the cars of the other, implies a stop at the junction to make the exchange or to take the cars. If there need be no stop, there need be no exchange or taking on of cars.

The only remaining questions are as to the obligation of the Atchison, Topeka & Santa Fé Company to carry for the Denver & New Orleans when passengers go to or freight is delivered at the regular stations, and the prices to be charged. As to the obligation to carry, there is no dispute, and we do not understand it to be claimed that carriage has ever been refused when applied for at the proper place. The controversy, and the only controversy, is about the place and the price.

That the price must be reasonable is conceded, and it is no doubt true that in determining what is reasonable the prices charged for business coming from or going to other roads connecting at Pueblo may be taken into consideration. But the relation of the Denver & New Orleans Company to the Atchison, Topeka & Santa Fé is that of a Pueblo customer, and it does not necessarily follow that the price which the Atchison, Topeka & Santa Fé gets for transportation to and from Pueblo, on a division of through rates among the component companies of a through line to Denver, must settle the Pueblo local rates. It may be that the local rates to and from Pueblo are too high, and that they ought to be reduced, but that is an entirely different question from a division of through rates. There is no complaint of a discrimination against the Denver & New Orleans Company in respect to the regular Pueblo rates; neither is there anything except the through

rates to show that the local rates are too high. The bill does not seek to reduce the local rates, but only to get this company put into the same position as the Denver & Rio Grande on a division of through rates. This cannot be done until it is shown that the relative situations of the two companies with the Atchison, Topeka & Santa Fé, both as to the kind of service and as to the conditions under which it is to be performed, are substantially the same, so that what is reasonable for one must necessarily be reasonable for the other. When a business connection shall be established between the Denver & New Orleans Company and the Atchison, Topeka & Santa Fé at their junction, and a continuous line formed, different questions may arise; but so long as the situation of the parties continues as it is now, we cannot say that, as a matter of law, the prices charged by the Atchison, Topeka & Santa Fé, for the transportation of persons and property coming from or going to the Denver & New Orleans, must necessarily be the same as are fixed for the continuous line over the Denver & Rio Grande. . . .

All the American cases to which our attention has been called by counsel relate either to what amounts to undue discrimination between the customers of a railroad company, or to the power of a court of chancery to interfere, if there is such a discrimination. None of them hold that, in the absence of statutory direction, or a specific contract, a company having the power to locate its own stopping-places can be required by a court of equity to stop at another railroad junction and interchange business, or that it must under all circumstances give one connecting road the same facilities and the same rates that it does to another with which it has entered into special contract relations for a continuous through line and arranged facilities accordingly. The cases are all instructive in their analogies, but their facts are different from those we have now to consider.

We have not referred specially to the tripartite agreement or its provisions, because, in our opinion, it has nothing to do with this case as it is now presented. The question here is whether the Denver & New Orleans Company would have the right to the relief it asks if there were no such contract, not whether the contract, if it exists, will be a bar to such a right. The real question in the case, as it now comes before us, is whether the relief required is legislative in its character or judicial. We think it is legislative, and that upon the existing facts a court of chancery can afford no remedy.

The decree of the Circuit Court is reversed, and the cause remanded with direction to *Dismiss the bill without prejudice.*

COVINGTON STOCK-YARDS COMPANY *v.* KEITH.

SUPREME COURT OF THE UNITED STATES, 1891.

[139 *U. S.* 128.]

MR. JUSTICE HARLAN delivered the opinion of the court.

On the 28th of January, 1886, George T. Bliss and Isaac E. Gates instituted in the court below a suit in equity against the Kentucky Central Railroad Company, a corporation of Kentucky, for the foreclosure of a mortgage or deed of trust given to secure the payment of bonds of that company for a large amount; in which suit a receiver was appointed who took possession of the railroad, with authority to operate it until the further order of the court.

The present proceeding was begun on the 18th of June, 1886, by a petition filed in the foreclosure suit by Charles W. Keith, who was engaged in buying and selling on commission, as well as on his own account, live stock brought to and shipped from the city of Covington, Kentucky, over the Kentucky Central Railroad. The petition proceeded upon the ground that unjust and illegal discrimination had been and was being made against Keith by the receiver acting under and pursuant to a written agreement made November 19, 1881, between the railroad company and the Covington Stock-Yards Company, a corporation created under the general laws of Kentucky; the yards of the latter company located in Covington, and connected with the railroad tracks in that city, being the only depot of the railway company that was provided with the necessary platforms and chutes for receiving or discharging live stock on and from its trains at that city. The petition alleged that Keith was the proprietor of certain live-stock lots and yards in that city immediately west of those belonging to the Covington Stock-Yards Company, and separated from them by only one street sixty feet in width; that he was provided with all the necessary means of receiving, feeding, and caring for such stock as he purchased, or as might be consigned to him by others for sale; and that his lots and yards were used for that purpose subsequently to March 1, 1886, and until, by the direction of the receiver, the platforms connecting them with the railroad were torn up and rendered unfit for use. The prayer of the petitioner was for a rule against the receiver to show cause why he should not deliver to him at some convenient and suitable place outside of the lots or yards of the said Covington Stock-Yards Company free from other than the customary freight charges for transportation, all stock owned by or consigned to him and brought over said road to Covington.

The receiver filed a response to the rule, and an order was entered giving leave to the Covington Stock-Yards Company to file an intervening petition against the railroad company and Keith, and requiring the latter parties to litigate between themselves the question of the

validity of the above agreement of 1881. The Stock-Yards Company filed such a petition, claiming all the rights granted by the agreement referred to, and alleging that it had expended sixty thousand dollars in constructing depots, platforms, and chutes, as required by that agreement.

Referring to that agreement it appears that the Stock-Yards Company stipulated that its yards on the line of the railroad in Covington should be maintained in good order, properly equipped with suitable fencing, feeding-pens, and other customary conveniences for handling and caring for live stock, and to that end it would keep at hand a sufficient number of skilled workmen to perform the operations required of it, and generally to do such labor as is usually provided for in stock yards of the best class, namely, to load and unload and care for "in the best manner all live stock delivered to them by the party of the first part [the railroad company] at their own risk of damage while so doing, and in no event to charge more than sixty cents per car of full loads for loading and sixty cents per car for unloading, and no charges to be made for handling less than full loads, as per way-bills." The Stock-Yards Company also agreed to become liable for those charges, and to collect and pay over to the railroad company, as demanded from time to time, such money as came into its hands, the charges for feeding and caring for live stock not to be more than was charged for similar services and supplies at other stock yards of the country. The railroad company, upon its part, agreed to pay the Stock-Yards Company the above sums for loading and unloading and otherwise acting as its agent in the collection of freights and charges upon such business as was turned over to it by the railroad company; that it would require all cars loaded at yards for shipment South or East to be carefully bedded, which the Stock-Yards Company was to do at the rates usually charged in other yards; that it would make the yards of the Stock-Yards Company its "depot for delivery of all its live stock," during the term of the contract, and not build, "nor allow to be built, on its right of way, any other depot or yards for the reception of live stock." The delivery of stock in cars on switches or sidings provided for the purpose was to be considered a delivery of the stock to the Stock-Yards Company, which, from that time, was to be responsible for the stock to the railroad company. To protect the business of the Stock-Yards Company from damage in case the railroad extended its track over the Ohio River, the railroad company agreed that during the term of the contract the rate of freight from all points on its road and connections should "not be less than five dollars per car more to the Union Yards of Cincinnati than the rate to Covington yards from the same points;" that its business arrangements with any other railroad or transportation line should be subject to this agreement; and that the yards of the Stock-Yards Company "shall be the depot for all live stock received from its connections for Cincinnati or Eastern markets." The agreement by its terms was to remain in force for fifteen years.

In the progress of the cause E. W. Wilson, by consent of parties, was made a co-petitioner and co-respondent with Keith.

By the final decree it was found, ordered, and decreed as follows: "It is the duty and legal obligation of the Kentucky Central Railroad Company, as a common carrier of live stock, to provide suitable and convenient means and facilities for receiving on board its cars all live stock offered for shipment over its road and its connections from the city of Covington, and for the discharge from its cars of all live stock brought over its road to the said city of Covington, free of any charge other than the customary transportation charges to consignors or consignees; and that the said petitioners, Keith and Wilson, live-stock dealers and brokers, doing business at the city of Covington, and proprietors of the Banner Stock-Yards at that place, are entitled to so ship and receive over said road such live stock without being subject to any such additional charges imposed by said receiver, said railroad company, or other person or corporation. The court further finds and decrees that the alleged contract entered into by and between the said railroad company and the said Covington Stock-Yards Company, of date the 19th day of November, 1881, does not entitle the said Stock-Yards Company to impose upon any shipper of live stock over said road, passing such stock through the yards of said company to and from the cars of said railroad company, any charge whatever for such passage. It is stipulated in said contract that said Stock-Yards Company shall establish and maintain suitable yards or pens for receiving, housing, feeding, and caring for live stock, and to receive all such stock, and load and unload the same upon and from the cars of said company transported on or to be transported over said road for a compensation of sixty cents per car load, to be paid by said railroad company for and during the period of fifteen years from the date of said contract, which has not yet expired, while the said railroad company agreed that it would not during said period establish or allow to be established on the line of its road or on its right of way in said city of Covington any other platform or depot than that of said Stock-Yards Company for the receipt or delivery of such live stock. . . . The court doth further find that the general freight depot of the said railroad company in the said city of Covington, at the terminus of its road between Pike and Eighth Streets, is not a suitable or convenient place for the receipt and delivery of live stock brought to the said city or to be shipped therefrom over said road, and neither said railroad company nor said receiver having provided such suitable depot or place therefor, except the yards of said Stock-Yards Company, it is now ordered and decreed that the said railroad company and said receiver shall hereafter receive and deliver from and to the said Keith & Wilson at and through the said Covington stock yards all such live stock as may be brought to them or offered by them for shipment over said road and its connections, upon the consent of said stock yards, in writing, that it may be so done, being filed in this court and cause on or before the 1st day of January next after the

entry of this decree, free of any charge for passing through said yards to and from the cars of said railroad company. In default of such consent being so filed, it is ordered and decreed that upon said Keith & Wilson putting the platform and chute erected by them on the land of said Keith adjacent to the live-stock switch of said railroad company north of said stock yards the said railroad company and said receiver shall receive and deliver all such live stock to said Keith & Wilson as shall be consigned to them or either of them or be offered by them or either of them for shipment at said platform. The said Keith & Wilson shall provide an agent or representative at said platform to receive such cattle as they may be notified by said railroad company or said receiver are to be delivered to them thereat, and they shall give the said railroad company or said receiver reasonable notice of any shipment desired to be made by them from said platform to conform to the departure of live-stock trains on said road."

The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections, as well as for discharging such stock after it reaches the place to which it is consigned. The vital question in respect to such matters is, whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public. But it is contended that the decree is erroneous so far as it compels the railroad company to receive live stock offered by the appellees for shipment and to deliver live stock consigned to them, free from any charge other than the customary one for transportation, for merely passing into and through the yards of the Covington Stock-Yards Company to and from the cars of the railroad company. As the decree does not require such stock to be delivered in or through the yards of the appellant, except with its written consent filed in this cause; as such stock cannot be properly loaded upon or unloaded from cars within the limits of the city, except by means of inclosed lots or yards set apart for that purpose, and conveniently located, in or through which the stock may be received from the shipper or delivered to the consignee, without danger or inconvenience to the public in the vicinity of the place of shipment or discharge; and as the appellant has voluntarily undertaken to discharge the duty in these matters that rests upon the railroad company, the contention just adverted to, is, in effect, that the carrier may, without a special contract for that purpose, require the shipper or consignee, in addition to the customary and legitimate charges for transportation, to compensate it for supplying the means and facilities that must be provided by it in order to meet its obligations to the public. To this proposition we cannot give our assent.

When animals are offered to a carrier of live stock to be transported it is its duty to receive them; and that duty cannot be efficiently discharged, at least in a town or city, without the aid of yards in which

the stock offered for shipment can be received and handled with safety and without inconvenience to the public while being loaded upon the cars in which they are to be transported. So, when live stock reach the place to which they are consigned, it is the duty of the carrier to deliver them to the consignee; and such delivery cannot be safely or effectively made except in or through inclosed yards or lots, convenient to the place of unloading. In other words, the duty to receive, transport, and deliver live stock will not be fully discharged, unless the carrier makes such provision, at the place of loading, as will enable it to properly receive and load the stock, and such provision, at the place of unloading, as will enable it to properly deliver the stock to the consignee.

A railroad company, it is true, is not a carrier of live stock with all the responsibilities that attend it as a carrier of goods. North Penn. Railroad *v.* Commercial Bank, 123 U. S. 727, 734. There are recognized limitations upon the duty and responsibility of carriers of inanimate property that do not apply to carriers of live stock. These limitations arise from the nature of the particular property transported. "But," this court said, in the case just cited, "notwithstanding this difference in duties and responsibilities, the railroad company, when it undertakes generally to carry such freight, becomes subject, under similar conditions, to the same obligations, so far as the delivery of the animals which are safely transported is concerned, as in the case of goods. They are to be delivered at the place of destination to the party designated to receive them if he presents himself, or can with reasonable efforts be found, or to his order. No obligation of the carrier, whether the freight consists of goods or live stock, is more strictly enforced."[1] The same principle necessarily applies to the receiving of live stock by the carrier for transportation. The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported, as well as to the necessities of the respective localities in which it is received and delivered. A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of

[1] Myrick *v.* Michigan Central Railroad, 107 U. S. 102, 107; Hall & Co. *v.* Renfro, 3 Met. (Ky.) 51, 54; Mynard *v.* Syracuse & Binghamton Railroad, 71 N. Y. 180; Smith *v.* New Haven & Northampton Railroad, 12 Allen, 531, 533; Kimball *v.* Rutland & Burlington Railroad, 26 Vt. 247; South & North Alabama Railroad Company *v.* Henlein, 52 Ala. 606, 613; Wilson *v.* Hamilton, 4 Ohio St. 722, 740; Ayres *v.* Chicago & Northwestern Railroad, 71 Wis. 372, 379, 381; McCoy *v.* K. & D. M. R. Co., 44 Iowa, 424, 426; Maslin *v.* B. & O. R. R. Co., 14 W. Va. 180, 188; St. Louis & Southeastern Railway *v.* Dorman, 72 Ill. 504; Moulton *v.* St. Paul, Minneapolis, &c. Railway, 31 Minn. 85, 87; Kansas Pacific Railway *v.* Nichols, 9 Kas. 235, 248; Clarke *v.* Rochester & Syracuse Railroad, 14 N. Y. 570, 573; Palmer *v.* Grand Junction Railway, 4 M. & W. 749.

its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock yards which itself owns, maintains, or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.

We must not be understood as holding that the railroad company, in this case, was under any legal obligation to furnish, or cause to be furnished, suitable and convenient appliances for receiving and delivering live stock at every point on its line in the city of Covington where persons engaged in buying, selling, or shipping live stock, chose to establish stock yards. In respect to the mere loading and unloading of live stock, it is only required by the nature of its employment to furnish such facilities as are reasonably sufficient for the business at that city. So far as the record discloses, the yards maintained by the appellants are, for the purposes just stated, equal to all the needs, at that city, of shippers and consignees of live stock; and if the appellee had been permitted to use them, without extra charge for mere "yardage," they would have been without just ground of complaint in that regard; for it did not concern them whether the railroad company itself maintained stock yards, or employed another company or corporation to supply the facilities for receiving and delivering live stock it was under obligation to the public to furnish. But as the appellant did not accord to appellees the privileges they were entitled to from its principal, the carrier, and as the carrier did not offer to establish a stock yard of its own for shippers and consignees, the court below did not err in requiring the railroad company and the receiver to receive and deliver live stock from and to the appellees at their own stock yards in the immediate vicinity of appellant's yards, when the former were put in proper condition to be used for that purpose, under such reasonable regulations as the railroad company might establish. It was not within the power of the railroad company, by such an agreement as that of November 19, 1881, or by agreement in any form, to burden the appellees with charges for services it was bound to render without any other compensation than the customary charges for transportation.

Decree affirmed.

BUTCHERS' & DROVERS' STOCK-YARD CO. *v.* LOUISVILLE & NASHVILLE RAILROAD.

CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, 1895.

[67 *Fed.* 35]

TAFT, Circuit Judge, delivered the opinion of the court.[1]

This is an action in equity by a stock-yards company for a mandatory injunction to compel a railroad company to build, or to allow to be built, a side track connecting a spur track of the railroad company with the stock yards of the complainant, and there to deliver and receive all cattle consigned to and shipped by the complainant. The defendant answered, and the cause was heard on pleadings and evidence, and resulted in a dismissal of the bill. The complainant appeals. The facts are substantially as follows: The complainant, the Butchers' & Drovers' Stock-Yards Company, was organized under the laws of Tennessee, and entered upon its business in 1889. It has a stock yard within the city limits of the city of Nashville, and near to the business centre thereof. The Louisville & Nashville Railroad Company is a corporation of Kentucky, whose line of railroad extends to and through Nashville from Louisville. In 1890 the city council of the city of Nashville passed an ordinance permitting the defendant company to lay a spur track from its main track along Front Street in said city. . . .

Sidings were laid by the defendant from the spur track to the property of W. G. Bush & Co., Jacob Shaffer, Levi Langham, and the Capitol Electric Company, and others, under contracts made by the railroad company with these parties, in each of which the defendant retained the right to disconnect the siding from the spur track at any time without notice to the other party. The persons or firms with whom these contracts were made were manufacturing firms or coal dealers. They all owned land abutting on Front Street. Complainant is engaged in receiving, feeding, weighing, selling, and shipping live stock for the general public. Its yards are a block away from the defendant's main line. . . . In 1891, after the spur track and the sidings already alluded to had been constructed, the complainant requested the defendant that a siding be so constructed in front of complainant's property as to allow the transportation of live stock to and from its establishment in car-load lots, and that the same facilities for transportation be afforded to it as were enjoyed by Bush & Co. and the others who then had sidings. . . .

Defendant's attorney answered complainant's request, and stated that, inasmuch as the siding proposed appeared to be desired solely for the purpose of receiving and delivering live stock at defendant's yards, and the railroad company had provided a station for this purpose at Nashville, the establishment of another was declined.

[1] Part of the opinion is omitted. — ED.

The stock-yards station referred to was that of the Union Stock-Yards Company, . . . about a mile and a half from the stock yards of the complainant. The evidence in the record, some of which was admitted, and some of which was excluded by the court below, shows that no charge beyond the ordinary charge for transportation is made for the loading and unloading of cattle at the stock yards to the shipper or consignee; that after the cattle have been unloaded, and have not been taken away by the consignee from the yard for two or three hours, they are then turned into the pens of the stock yards, where a charge of two dollars per car for a day or part of a day is made by the stock-yards company for keeping them, until the consignee takes them away. When cattle arrive at night, the usual result is that they are turned into the pens, because the consignee cannot drive them through the streets at night. There was evidence also of a charge of five or ten cents per head by the stock-yards company if, after the cattle have been priced in the Union Yards, they are removed without sale to another stock yard. . . .

It is insisted that the court will not establish a right that may be dissolved at the will of the defendant. The railroad company reserves the right in its contract with Bush to take up the spur track at any time, and therefore it is said that it cannot be compelled to do that for the complainant which it might at once cease to do by taking up the track. This objection is untenable. The gravamen of the charge in the bill is that the railroad company is discriminating against the complainant, and in favor of those to whom sidings from the spur track are permitted, and that it should be granted equal facilities with such persons. The prayer is in form for an injunction against the discrimination. If the spur track is taken up, then all who enjoy it will be placed on an equal footing and at an equal disadvantage. But complainant's claim is that, while others enjoy the spur track, it also should have the same facilities. It is clearly no defense to a charge of discrimination that the facilities furnished the favored person may be withdrawn at the will of the one who grants them.

We are therefore brought to the issue whether or not there is any discrimination between those who have side-track connections on Front Street and the complainant. This depends on two questions: First. Is it a discrimination which can be controlled or restrained by the courts for a railroad company to furnish a side track to one of its customers, and to refuse such accommodation to another similarly situated? Second. Conceding an affirmative answer to the first question, is there such a difference between the facilities demanded by the complainant and those extended to its neighbors on Front Street, in respect of the comparative burdens which must be assumed by the railway company in granting them, as to justify the latter in making the distinction it insists upon?

The first question is one full of difficulty, both at common law, upon the principles of which this case must be decided, and also

under the interstate commerce act. Because we are able to satisfactorily dispose of the case on the second question, we reserve consideration of the first until the case arises which requires it. We are clearly of opinion that, however unjust and unlawful it may be for a railroad company having furnished a side track to one shipper to refuse it to another similarly situated, the difference in this case between the business of the complainant and that of the other abutters upon the spur track is so great as to make the refusal of the railroad company to grant the side track to the complainant entirely reasonable. The difference between the duties of a common carrier in the transportation of live stock and of dead freight has been remarked upon more than once by the Supreme Court of the United States. North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727–734; Stock-Yards Co. *v.* Keith, 139 U. S. 128–133. The evidence clearly shows that the delivery of car-load lots of dead freight and the receipt of them by side tracks is much less onerous, and involves much less care and responsibility for the railroad company, than would the receipt of live stock from a private yard by side track. One of the chief reasons why deliveries and shipments of railroad car-load lots by side track are possible and consistent with the conduct of the business of a large trunk line is that the loaded car may stand upon a side track for hours, or even a day, until the railroad company finds it convenient to back its engine down and take it. Such delays are utterly impossible in the proper transportation of car loads of live stock. When they are loaded, they must be moved. The evidence shows that in other respects the supervision of the switching of cattle cars would be much more expensive and troublesome to the railway company than dead freight. Indeed, it hardly needs expert evidence to establish it. There is no ground, therefore, for any charge of unjust discrimination against the defendant railway company as between complainant and the Front Street shippers.

We come now to the charge of discrimination as between the Butchers' & Drovers' Stock-Yards Company and the Union Stock-Yards Company. [The court here stated the case of Stock-Yards Co. *v.* Keith, 139 U. S 128, and quoted at length from the opinion in that case.]

In view of the principles laid down in this case, the complainant has no ground for objection to the arrangement between the Union Stock-Yards Company and the Louisville & Nashville Railroad Company. The latter uses the chutes and yards of the Union Stock-Yards Company to deliver and receive cattle at that point as its station without any yardage charge or fee for the proper loading and unloading of cattle. The evidence wholly fails to support the charge of the bill that the facilities afforded by the Union Stock Yards are not ample for the business of Nashville. The evidence establishes that no charge is made by the Union Stock-Yards Company for two hours after the cattle are delivered from the cars. There is no evidence to

show that it would be unreasonable in the railroad company, were it the owner of the stock yards, to impose a charge for delay of the consignee in taking his cattle beyond two hours after unloading; and, in the absence of such showing, we cannot say that it is unreasonable for the railroad company to permit its agent, the stock-yards company, to make a charge of two dollars per car for turning the cattle into the pens and keeping them there after such a delay. The discrimination averred and sought to be proven by evidence that, after the cattle have been priced in the pen, they cannot be taken to another yard without paying a fee, concerns the business of the stock-yards company, and not that of the railroad company, whose responsibility ends after the cattle are properly delivered or tendered to the consignee. Of course, the railroad company in delivering the cattle to the stock-yards company, to keep until the appearance of the consignee, can incur only a reasonable charge for the keeping of the cattle. More than this, the consignee is not obliged to pay the stock-yards company. If, however, he thereafter chooses to deal with the stock-yards company as a factor or sales agent, and to put a price upon his cattle for sale, the charges then imposed by the regulations of the stock-yards company, in case of a withdrawal of the cattle to another stock yard for sale, are wholly outside the question of discrimination by the railroad company as a common carrier. The contract between the defendants and the Union Company requires rates charged by the latter to be reasonable. There is no attempt in the record to show that the charge for the simple keep of the cattle in the pens is unreasonable or any higher than the railway company itself might charge for such service.

The decree of the court below is affirmed, with costs.

WALKER *v.* KEENAN.

CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT, 1896.

[73 *Fed.* 755.]

SHOWALTER, Circuit Judge.[1] In Covington Stock-Yards Co. *v.* Keith, 139 U. S. 128, . . . the court ordered the receivers, in the event that they or their agent in that behalf, the Covington Stock-Yards Company, should choose not to permit Keith thereafter to take his cattle through their yards without the 60 cents charge, to allow him to replace his platforms and chutes, and to unload and deliver to him thereat (he, or some agent employed by him, being then present to take charge of such cattle) all cattle consigned to him or to his yards. This ruling was affirmed by the Supreme Court of the United States.

[1] Part of the opinion is omitted. — ED.

As incidental to its business of transporting or hauling cattle, a railroad company must provide the means of loading, unloading, and caring for such freight pending its delivery to the consignee. The hauling the cattle from one point to another, and the providing the car, track, engine, and servants for that purpose, are no more a part of the service reudered by the carrier than are the loading and unloading and the providing the appliances and servants for those purposes. Nor, in the nature of things, is there any reason why, if the public convenience be subserved thereby, the compensation may not be apportioned so that so much may be paid for the loading and the hauling, and so much for the uuloading and the care of the animals pending delivery. It was not necessarily a hardship or wrong, as against the ordinary consignee at Covington, that he pay the charge of 60 cents per car for unloading, etc., to the agent in charge of the stock yards there. Such charge ought, of course, to be specified, as now provided by the interstate commerce law, in connection with the tariff schedule, in order that the shipper may be advised of the same. The question whether a person to whom cattle were consigned for delivery at the Covington Stock Yards could have resisted the charge of 60 cents per car was not before the court in the Keith Case; nor could the court have ruled in the affirmative on such question, assuming due notice to the shipper beforehand, without, in effect, compelling the railroad company to perform, for nothing, part of the service comprehended in its obligations as a carrier. Keith's Case stood on its own facts. Keith having, without inconvenience, so far as appears, to the public or to the railroad company, and apparently by its permission or the permission of the receivers, himself provided the facilities and appliances for unloading into his yards cattle consigned to his firm, the railroad company or the receivers representing it, on the one hand, no longer owed to him, as respected cattle consigned to his yards, the duty of providing such structures and appliances; nor, on the other, was Keith bound to pay the railroad company or its agent in that behalf, the Covington Stock-Yards Company, any charge which, on the face of the case, was distinctly a compensation for the performance of such duty. The Case of Keith, furthermore, shows the expediency and propriety of separating and apportioning the compensation to the carrier, so that the instrumentalities for and the service of unloading need not be paid for when the consignee has no occasion to use said instrumentalities or to exact such service. That decision, on its ultimate and essential facts, is that a railroad company, when the means for the unloading and delivery of cattle have been provided by the consignee himself at a convenient point on its line of road, may not refuse to make such delivery for the sole and only purpose of compelling such consignee to pay a charge fixed by the company in response to its obligation to provide the means of unloading for consignees who must, necessarily, require that service. If Keith's yards had been at some point in

Covington, remote from the Kentucky Central track, and he had, by the license of the Kentucky Central Railroad Company or the receivers, extended a track of his own from the Kentucky Central track to his yards, and had there equipped a station for unloading, there would have been no obligation on the railroad company to Keith or his patrons to provide a depot on its line for the unloading of cattle consigned to his yards; nor could Keith have referred to such supposititious obligation as a reason for resisting compensation to the railroad company for the service of moving cattle cars from its line over his track to his yards.

In the case at bar, appellants, with their own engines and switching crew, remove the cars laden with cattle from a point on the Chicago end of their line, over the track of the Union Stock-Yards & Transit Company, to the Union Stock Yards. For this transfer from their own line to the stock yards, they charge, as stated on the tariff schedule, $2 per car. All the petitioners do business at the Union Stock Yards. It is the understanding between them and appellants that cattle cars consigned to them are to be taken to the Union Stock Yards, and there unloaded. Upon the general and ordinary obligation of a common carrier of such freight to provide the appliances for unloading, and upon the fact that appellants have not provided means for unloading and delivering cattle at their freight depot in Chicago, petitioners argue: First, that the $2 per car is for depot facilities at the stock yards; and, second, that the stock-yards station must be held to be appellants' "Chicago station," in the same sense as would be the terminal station at Twelfth and State Streets if cattle yards and facilities for unloading were there provided. But the obligation of appellants to furnish delivery facilities upon their line of road in Chicago is not due to these petitioners with respect to cattle which appellants are expected to bring to the Union Stock Yards. Petitioners do not desire their cattle unloaded and delivered at any point in Chicago on appellants' line of road. The $2 per car is not a charge for the use of the inclosures and station fittings at the stock yards, but for moving the cars from the line of appellants' road, and over the line of another company (which company exacts from appellants a toll of 80 cents per car), to a point in Chicago on said last-named line. The case is the same as though petitioners themselves owned the stock yards, and the delivery station there, and the tracks leading to said station, and appellants charged them $1.20 for transferring a car from appellants' line in Chicago to said stock-yards station. If facilities for unloading cattle cars were provided by appellants at their station in Chicago (the showing of the record being otherwise, as it is), the fact would be immaterial, since the petitioners' cattle must be taken by appellants to the Union Stock Yards. Appellants' failure to supply unloading facilities at its Chicago terminal station can in no way affect the rights of a litigant who, in view of the question at issue, could in no event have benefited by such facilities.

The learned counsel for appellees treat the Covington Case as a pronouncement by the supreme court that the receivers there must forego their 60 cents per car, and let Keith's cattle be delivered through the Covington Stock Yards, unconditionally. On the contrary, the essential and central fact upon which the judgment went was, as already explained, that Keith's yards adjoined the track, and he had, without hurt to the railroad company or to the public, and apparently by the license of the company, provided the means of unloading into his own yards. He had no occasion to avail himself of the service of, and the instrumentalities provided by, the Covington Stock-Yards Company, the concern which had assumed, to that extent, the duty of the carrier; hence the order that his cattle must either be unloaded into his own yards, or else passed free of charge through the yards controlled by the Covington Stock-Yards Company for the railroad. If the rule of law had been as counsel for these appellees contend, then the order would have been that Keith's cattle be unloaded free of charge into the yards used by the railroad company, without any alternative. The alternative implies that except in the case of Keith, or of a person having cattle yards and unloading facilities in Covington similarly situated with respect to the road operated by the receivers, the yards provided by the railroad company or the receivers as a place of delivery must be used, and the 60 cents paid as a proper item in the freight charge. To any assumed rule of law that a carrier could not divide into two or more items his freight charge for carrying live stock, so that the instrumentalities for unloading and delivery need not be paid for by consignees who are themselves prepared to receive their cattle directly from the cars, the decision in the Covington Case cannot be referred. The opinion states no such rule; nor can any such rule be evolved therefrom consistently with the judgment of the court.

When, as here, the delivery is to be made in Chicago, but at a point away from the carrier's line, and by means of a track not owned or possessed by the carrier, the printed schedule of such carrier showing in two items the compensation exacted for the haul to Chicago, and that exacted for the transfer in Chicago to the point of delivery, the theory that such carrier is bound by law to unload such freight at a station on its own line in Chicago, and that the transfer from its line to a point on the other line for the purpose of delivering at the latter point (being an equivalent or substitute for what ought to have been done pursuant to such supposed obligation) is comprehended in the service of hauling to some station on its line in Chicago, is unsound. One side of the proposed equation is mythical. There is no obligation on the carrier in such a case, and as to such a consignment, to unload at a station on its line in Chicago, or to provide unloading and delivery facilities at such station. In the carrier's charge for the haul to any station or point on its line in Chicago, in such a case, there is not comprehended any compensation for unload-

ing facilities at such station or point. The 23½ cents per hundredweight pays these appellants for hauling from Kansas City to a station or point on their line in Chicago, the $2 per car pays for the transfer thence to the stock yards, where the consignees desire the delivery to be made.

The Covington Case was prior to the interstate commerce law. Within the express terms of the second paragraph of section 6, quoted in the statement which precedes this opinion, the total compensation to the carrier for his services as carrier may be divided into at least two items. The separation by these appellants of their charge for loading and hauling to Chicago from their charge for transferring from their line in Chicago to a specified point in Chicago, away from their line, is authorized by the statute. No satisfactory reason suggests itself against the legality and propriety, under special circumstances, such as exist here and as existed in the Covington Case, of such a division of his compensation by a carrier even apart from the statute. The learned district judge who made the order appealed from evidently understood the opinion in the Covington Case to imply that no division of a carrier's charge could be made. If this were the sound construction of that case, the statute has changed the rule, as already suggested.

It is not suggested, assuming any such charge as is here in question to be legal at all, that the amount is unreasonable. The contention that the carriers must move cattle from their lines of road over the track of the stock-yards company to the stock yards, without compensation other than as contained in their charges for hauling to points on their respective lines in Chicago (and this is what the claim of these appellees amounts to), is invalid.

The order appealed from is reversed, and the cause remanded, with the direction that said order be vacated, and the intervening petitions dismissed, for want of equity.

AYRES *v.* CHICAGO & NORTHWESTERN RAILWAY.

SUPREME COURT OF WISCONSIN, 1888.

[71 *Wis.* 372: 37 *N. W.* 432]

THE amended complaint is to the effect that the defendant, being a common carrier engaged in the transportation of live stock, and accustomed to furnish cars for all live stock offered, was notified by the plaintiffs, on or about October 13, 1882, to have four such cars for the transportation of cattle, hogs, and sheep at its station La Valle, and three at its station Reedsburg, ready for loading on Tuesday morning, October 17, 1882, for transportation to Chicago; that the defendant neglected and refused to provide such cars at either of said stations for four days, notwithstanding it was able and might reasonably have done

so; and also neglected and refused to carry said stock to Chicago with reasonable diligence, so that they arrived there four days later than they otherwise would have done; whereby the plaintiffs suffered loss and damage, by decrease in price and otherwise, $1,700.[1]

CASSODAY, J. We are forced to the conclusion that at the time the plaintiffs applied for the cars the defendant was engaged in the business of transporting live stock over its roads, including the line in question, and that it was accustomed to furnish suitable cars therefor, upon reasonable notice, whenever it was within its power to do so; and that it held itself out to the public generally as such carrier for hire upon such terms and conditions as were prescribed in the written contracts mentioned. These things, in our judgment, made the defendant a common carrier of live stock, with such restrictions and limitations of its common-law duties and liabilities as arose from the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals, under the contracts of carriage. This proposition is fairly deducible from what was said in Richardson *v.* C. & N. W. R. Co., 61 Wis. 601, and is supported by the logic of numerous cases. North Penn. R. Co. *v.* Commercial Bank, 123 U. S. 727; Moulton *v.* St. P., M. & M. R. Co., 31 Minn. 85, 12 Am. & Eng. R. Cas. 13; Lindsley *v.* C., M. & St. P. R. Co., 36 Minn. 539; Evans *v.* F. R. Co., 111 Mass. 142; Kimball *v.* R. & B. R. Co., 26 Vt. 247, 62 Am. Dec. 567; Rixford *v.* Smith, 52 N. H. 355; Clarke *v.* R. & S. R. Co., 14 N. Y. 570, 67 Am. Dec. 205; South & N. A. R. Co. *v.* Henlein, 52 Ala. 606; Baker *v.* L. & N. R. Co., 10 Lea, 304, 16 Am. & Eng. R. Cas. 149; Philadelphia W. & B. R. Co. *v.* Lehman, 56 Md. 209; McFadden *v.* M. P. R. Co., 92 Mo. 343; 3 Am. & Eng. Cyclop. Law, pp. 1–10, and cases there cited. This is in harmony with the statement of PARKE, B., in the case cited by counsel for the defendant, that "at common law a carrier is not bound to carry for every person tendering goods of *any* description, *but his obligation is to carry according to his public profession.*" Johnson *v.* Midland R. Co., 4 Exch. 372. Being a common carrier of live stock for hire, with the restrictions and limitations named, and holding itself out to the public as such, the defendant is bound to furnish suitable cars for such stock, upon reasonable notice, whenever it can do so with reasonable diligence without jeopardizing its other business as such common carrier. Texas & P. R. Co. *v.* Nicholson, 61 Tex. 491; Chicago & A. R. Co. *v.* Erickson, 91 Ill. 613; Ballentine *v.* N. M. R. Co., 40 Mo. 491; Guinn *v.* W., St. L. & P. R. Co., 20 Mo. App. 453.

Whether the defendant could with such diligence so furnish upon the notice given, was necessarily a question of fact to be determined. The plaintiffs, as such shippers, had the right to command the defendant to furnish such cars. But they had no right to insist upon or expect compliance, except upon giving reasonable notice of the time when they would be required. To be reasonable, such notice must have been suf-

[1] The statement of facts and part of the opinion are omitted. — ED.

ficient to enable the defendant, with reasonable diligence under the circumstances then existing, to furnish the cars without interfering with previous orders from other shippers at the same station, or jeopardizing its business on other portions of its road. It must be remembered that the defendant has many lines of railroad scattered through several different States. Along each and all of these different lines it has stations of more or less importance. The company owes the same duty to shippers at any one station as it does to the shippers at any other station of the same business importance. The rights of all shippers applying for such cars under the same circumstances are necessarily equal. No one station, much less any one shipper, has the right to command the entire resources of the company to the exclusion or prejudice of other stations and other shippers. Most of such suitable cars must necessarily be scattered along and upon such different lines of railroad, loaded or unloaded. Many will neccssarily be at the larger centers of trade. The conditions of the market are not always the same, but are liable to fluctuations, and may be such as to create a great demand for such cars upon one or more of such lines, and very little upon others. Such cars should be distributed along the different lines of road, and the several stations on each, as near as may be in proportion to the ordinary business requirements at the time, in order that shipments may be made with reasonable celerity. The requirement of such fair and general distribution and uniform vigilance is not only mutually beneficial to producers, shippers, carriers, and purchasers, but of business and trade generally. It is the extent of such business ordinarily done on a particular line, or at a particular station, which properly measures the carrier's obligation to furnish such transportation. But it is not the duty of such carrier to discriminate in favor of the business of one station to the prejudice and injury of the business of another station of the same importance. These views are in harmony with the adjudications last cited.

The important question is whether the burden was upon the plaintiffs to prove that the defendant might, with such reasonable diligence and without thus jeopardizing its other business, have furnished such cars at the time ordered and upon the notice given; or whether such burden was upon the defendant to prove its inability to do so. We find no direct adjudication upon the question. Ordinarily, a plaintiff alleging a fact has the burden of proving it. This rule has been applied by this court, even where the complaint alleges a negative, if it is susceptible of proof by the plaintiff. Hepler *v.* State, 58 Wis. 46. But it has been held otherwise where the only proof is peculiarly within the control of the defendant. Mecklem *v.* Blake, 16 Wis. 102; Beckmann *v.* Henn, 17 Wis. 412; Noonan *v.* Ilsley, 21 Wis. 144; Great Western R. Co. *v.* Bacon, 30 Ill. 352; Brown *v.* Brown, 30 La. Ann. 511. Here it may have been possible for the plaintiffs to have proved that there were at the times and stations named, or in the vicinity, empty cars, or cars which had reached their destination and might have been emptied with

reasonable diligence, but they could not know or prove, except by agents of the defendant, that any of such cars were not subject to prior orders or superior obligations. The ability of the defendant to so furnish with ordinary diligence upon the notice given, upon the principles stated was, as we think, peculiarly within the knowledge of the defendant and its agents, and hence the burden was upon it to prove its inability to do so. Where a shipper applies to the proper agency of a railroad company engaged in the business of such common carrier of live stock for such cars to be furnished at a time and station named, it becomes the duty of the company to inform the shipper within a reasonable time, if practicable, whether it is unable to so furnish, and if it fails to give such notice, and has induced the shipper to believe that the cars will be in readiness at the time and place named, and the shipper, relying upon such conduct of the carrier, is present with his live stock at the time and place named, and finds no cars, there would seem to be no good reason why the company should not respond in damages. Of course these observations do not involve the question whether a railroad company may not refrain from engaging in such business as a common carrier; nor whether, having so engaged, it may not discontinue the same.

The court very properly charged the jury, in effect, that if all the cars had been furnished on time, as the two were, it was reasonable to presume, in the absence of any proof of actionable negligence on the part of the defendant, that they would have reached Chicago at the same time the two did — to wit, Thursday, October 19, 1882, A. M., whereas they did not arrive until Friday evening. This was in time, however, for the market in Chicago on Saturday, October 21, 1882. This necessarily limited the recovery to the expense of keeping, the shrinkage, and depreciation in value from Thursday until Saturday. Chicago & A. R. Co. *v.* Erickson, 91 Ill. 613. The trial court, however, refused to so limit the recovery, but left the jury at liberty to include such damages down to Monday, October 23, 1882. For this manifest errror, and because there seems to have been a mistrial in some other respects, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

By the Court. — Ordered accordingly.

STATE *v.* CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY.

SUPREME COURT OF OHIO, 1890.

[47 *Ohio St.* 130: 23 *N. E.* 928.]

BRADBURY, J.[1] These actions are brought under the fourth clause of section 6761, Rev. St., which authorizes an action of *quo warranto*

[1] Part of the opinion is omitted. — ED.

to be brought against a corporation when it has misused a franchise, privilege, or right conferred upon it by law, or when it claims or holds, by coutract or otherwise, or has exercised a franchise, privilege, or right, in contravention of law. The petitions charge, among other things, that the defendants misused their corporate powers and franchises by discriminating in their rates of freight in favor of certain refiners of petroleum oil connected with the Standard Oil Company, by charging other shippers of like products unreasonable rates, by arbitrarily and suddenly changing the same, and, finally, by confederating with the favored shippers to create and foster a monopoly in refined oil, to the injury of other refiners and the public; and, further, that the defendants claimed and exercised, in contravention of law, the right to charge, for shipping oil in tank-cars, a lower rate of freight per 100 pounds than they charged for shipping the same in barrels, in car-load lots. The defendants, by answer, among other matters, denied charging any shippers unreasonable rates of freight, or that they arbitrarily or suddenly changed such rates, and denied any confederacy with any one to establish a monopoly. The actions were referred to a referee, to take the evidence, and to report to this court his findings of fact and conclusions of law therefrom, — all which has been done; and the cases are before us upon this report. . . .

That the Cincinnati, Washington & Baltimore Railway Company did discriminate in its rates for freight on petroleum oil in favor of the Camden Consolidated Oil Company, and that the Cincinnati, New Orleans & Texas Pacific Railway Company did the same in favor of the Chess-Carly Company, is shown by the finding of the referee, which is clearly sustained by the evidence. That these discriminating rates were in some instances strikingly excessive, tended to foster a monopoly, tended to injure the competitors of the favored shippers, and were in many instances prohibitory, actually excluding these competitors from extensive and valuable markets for their oil, giving to the favored shippers absolute control thereof, is established beyond any serious controversy. The justification interposed is that this was not done pursuant to any confederacy with the favored shipper, or with any purpose to inflict injury on their competitors, but in order that the railroad companies might secure freight that would otherwise have been lost to them. This we do not think sufficient. We are not unmindful of the difficulties that stand in the way of prescribing a line of duty to a railway company, nor do we undertake to say they may not pursue their legitimate objects, and shape their policy to secure benefits to themselves, though it may press severely upon the interests of others; but we do hold that they cannot be permitted to foster or create a monopoly, by giving to a favored shipper a discriminating rate of freight. As common carriers, their duty is to carry indifferently for all who may apply, and in the order in which the application is made, and

upon the same terms; and the assumption of a right to make discriminations in rates for freight, such as was claimed and exercised by the defendants in this case, on the ground that it thereby secured freight that it would otherwise lose, is a misuse of the rights and privileges conferred upon it by law. A full and complete discussion of the principles, and a thorough collation of the authorities, bearing upon the duties of railroad companies towards their customers, is to be found in the opinion of Judge ATHERTON, in the case of Scofield *v.* Railway Co., 43 Ohio St. 571, to which nothing need be now added.

It appears that, of the two methods of shipping oil, — that by the barrel, in car-load lots, and that in tank-cars, — the first only was available to George Rice, and the other refiners of petroleum oil at Marietta, Ohio, as they owned no tank-cars, nor did the defendants own or undertake to provide any; but that both methods were open to the Camden Consolidated Oil Company and the Chess-Carly Company, by reason of their ownership of tank-cars, and that the rate per barrel in tank-cars was very much lower than in barrel packages, in box-cars; that in fact the Cincinnati, Washington & Baltimore Railway Company, after allowing the Camden Consolidated Oil Company a rebate, and allowing the Baltimore & Ohio Railway Company for switching cars, received from the Camden Consolidated Oil Company only about one-half the open rates it charged the Marietta refiners, and that both railroad companies claimed the right to make different rates, based upon the different methods of shipping oil, and the fact of the ownership by shippers of the tank-cars used by them. It was the duty of the defendants to furnish suitable vehicles for transporting freight offered to them for that purpose, and to offer equal terms to all shippers. A railroad is an improved highway. The public are equally entitled to its use. It must provide equal accommodation for all, upon the same terms. The fact that one shipper may be provided with vehicles of his own entitles him to no advantage over his competitor not so provided. The true rule is announced by the interstate commerce commission in the report of the case of Rice *v.* Railroad Co. "The fact that the owner supplies the rolling stock when his oil is shipped in tanks, in our opinion, is entitled to little weight, when rates are under consideration. It is properly the business of railroad companies to supply to their customers suitable vehicles of transportation (Railroad Co. *v.* Pratt, 22 Wall. 123) and then to offer their use to everybody, impartially." 1 Int. St. Com. R. 547. No doubt, a shipper who owns cars may be paid a reasonable compensation for their use, so that the compensation is not made a cover for discriminating rates, or other advantages to such owner as a shipper. Nor is there any valid objection to such owner using them exclusively, as long as the carrier provides equal accommodations to its other customers. It may be claimed that if a railroad company permit all shippers, indifferently and upon equal terms, to provide cars suitable for their business, and to use them exclusively,

no discrimination is made. This may be theoretically true, but is not so in its application to the actual state of the business of the country; for a very large proportion of the customers of a railroad have not a volume of business large enough to warrant equipping themselves with cars, and might be put at a ruinous disadvantage in the attempt to compete with more extensive establishments. Aside from this, however, a shipper is not bound to provide a car. The duty of providing suitable facilities for its customers rests upon the railroad company; and if, instead of providing sufficient and suitable cars itself, this is done by certain of its customers, even for their own convenience, yet the cars thus provided are to be regarded as part of the equipment of the road. It being the duty of a railroad company to transport freight for all persons, indifferently, and in the order in which its transportation is applied for, it cannot be permitted to suffer freight-cars to be placed upon its track by any customer for his private use, except upon the condition that, if it does not provide other cars sufficient to transport the freight of other customers in the order that application is made, they may be used for that purpose. Were this not so, a mode of discrimination fatal to all successful competition by small establishments and operators with larger and more opulent ones could be successfully adopted and practiced at the will of the railroad company, and the favored shipper.

The advantages, if any, to the carrier, presented by the tank-car method of transporting oil over that by barrels, in box-cars, in car-load lots, are not sufficient to justify any substantial difference in the rate of freight for oil transported in that way; but if there were any such advantages, as it is the duty of the carrier to furnish proper vehicles for transporting it, if it failed in this duty, it could not, in justice, avail itself of its own neglect as a ground of discrimination. It must either provide tank-cars for all of its customers alike, or give such rates of freight in barrel packages, by the car-load, as will place its customers using that method on an equal footing with its customers adopting the other method. Judgment ousting defendants from the right to make or charge a rate of freight per 100 pounds for transporting oil in iron tank-cars, substantially lower than for transporting it in barrels, in car-load lots.

JENCKS *v.* COLEMAN.

CIRCUIT COURT OF THE UNITED STATES, 1835.

[2 *Sum.* 221.]

CASE for refusing to take the plaintiff on board of the steamboat *Benjamin Franklin* (of which the defendant was commander), as a passenger from Providence to Newport. Plea, the general issue.

The facts, as they appeared at the trial, were substantially as follow: That the plaintiff was the agent of the Tremont line of stages, running between Providence and Boston; that his object was to take passage in the boat to Newport, and then go on board the steamboat President, on her passage from New York to Providence, on the next morning, for the purpose of soliciting passengers for the Tremont line of stages for Boston. This the proprietors of the President and Benjamin Franklin had prohibited, and had given notice that they would not permit agents of that line of stages to take passage in their boats for that purpose. The reason assigned for such prohibition was, that it was important for the proprietors of the steamboats, that the passengers from their boats, for Boston, should find, at all times, on their arrival at Providence, an immediate and expeditious passage to Boston. To insure this object, the Citizens' Coach Company had contracted with the steamboat proprietors to carry all the passengers, who wished to go, in good carriages, at reasonable expedition and prices; and the commanders of the steamboats were to receive the fare, and make out way-bills of the passengers, for the Citizens' Coach Company. This they continued to perform. And, in order to counteract the effect of this contract, — which had been offered the Tremont line, and declined, — that line placed an agent on board the boats, to solicit passengers for their coaches; and, on being complained to by the Citizens' Coach Company, the proprietors of the steamboats interdicted such agents from coming on board their boats, and in this instance, refused to permit the plaintiff to take passage in the boat for Newport, though he tendered the customary fare.

The cause was argued by *R. W. Greene* and *Daniel Webster* for the plaintiff, and by *Rivers* and *Whipple* for the defendants.

For the *plaintiff* it was contended, that steamboat proprietors were common-carriers,— and every person, conducting himself with propriety, had a right to be carried, unless he had forfeited that right.

The plaintiff in this instance did conduct with propriety, and had not forfeited his right to be carried by any improper misconduct.

The steamboat proprietors and Citizens' Coach Company had attempted to establish a monopoly, which should not be countenanced, it being against the public interest. Such a monopoly operated to increase the price and prolong the time of passage from Providence to Boston; while open competition promoted the public interest and convenience, by reducing the fare and expediting the passage.

The plaintiff, in this instance, requested to be conveyed from Providence to Newport; during which passage, it was well known, no passengers were to be solicited, — that was to be done only on the passage from Newport to Providence.

For the *defendant*, it was contended, that the contract made by the steamboat proprietors and the Citizens' Company, was legal, and subserved the public convenience, and the interest of the proprietors of the boats and stages; it insured to the passengers expeditious passages

at reasonable prices; that the regulation, excluding the agents of the Tremont line of stages from the steamboats, was legal and just, because it was necessary to promote the foregoing objects, to wit: the public convenience, and the interests of the proprietors of both the boats and stages. Of this interdiction the plaintiff had received notice, and had no legal right to complain.

STORY, J., in summing up to the jury, after recapitulating the evidence, said: There is no doubt, that this steamboat is a common carrier of passengers for hire; and, therefore, the defendant, as commander, was bound to take the plaintiff as a passenger on board, if he had suitable accommodations, and there was no reasonable objection to the character or conduct of the plaintiff. The question, then, really resolves itself into the mere consideration, whether there was, in the present case, upon the facts, a reasonable ground for the refusal. The right of passengers to a passage on board of a steamboat is not an unlimited right, but it is subject to such reasonable regulations as the proprietors may prescribe, for the due accommodation of passengers and for the due arrangements of their business. The proprietors have not only this right, but the farther right to consult and provide for their own interests in the management of such boats, as a common incident to their right of property. They are not bound to admit passengers on board who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct; or who make disturbances on board; or whose characters are doubtful or dissolute or suspicious; and, *a fortiori*, whose characters are unequivocally bad. Nor are they bound to admit passengers on board whose object it is to interfere with the interests or patronage of the proprietors, so as to make the business less lucrative to them.

While, therefore, I agree that steamboat proprietors, holding themselves out as common carriers, are bound to receive passengers on board under ordinary circumstances, I at the same time insist that they may refuse to receive them if there be a reasonable objection. And as passengers are bound to obey the orders and regulations of the proprietors, unless they are oppressive and grossly unreasonable, whoever goes on board, under ordinary circumstances, impliedly contracts to obey such regulations; and may justly be refused a passage, if he wilfully resists or violates them.

Now, what are the circumstances of the present case? Jencks (the plaintiff) was, at the time, the known agent of the Tremont line of stage coaches. The proprietors of the Benjamin Franklin had, as he well knew, entered into a contract with the owners of another line (the Citizens' Stage Coach Company) to bring passengers from Boston to Providence, and to carry passengers from Providence to Boston, in connection with and to meet the steamboats plying between New York and Providence, and belonging to the proprietors of the Franklin. Such a contract was important, if not indispensable, to secure uniformity, punctuality, and certainty in the carriage of passengers on

both routes; and might be material to the interests of the proprietors of those steamboats. Jencks had been in the habit of coming on board these steamboats at Providence, and going therein to Newport; and commonly of coming on board at Newport, and going to Providence, avowedly for the purpose of soliciting passengers for the Tremont line, and thus interfering with the patronage intended to be secured to the Citizens' line by the arrangements made with the steamboat proprietors. He had the fullest notice that the steamboat proprietors had forbidden any person to come on board for such purposes, as incompatible with their interests. At the time when he came on board, as in the declaration mentioned, there was every reason to presume that he was on board for his ordinary purposes as agent. It has been said that the proprietors had no right to inquire into his intent or motives. I cannot admit that point. I think that the proprietors had a right to inquire into such intent and motives; and to act upon the reasonable presumptions which arose in regard to them. Suppose a known or suspected thief were to come on board; would they not have a right to refuse him a passage? Might they not justly act upon the presumption that his object was unlawful? Suppose a person were to come on board, who was habitually drunk, and gross in his behavior, and obscene in his language, so as to be a public annoyance; might not the proprietors refuse to allow him a passage? I think they might, upon the just presumption of what his conduct would be.

It has been said by the learned counsel for the plaintiff, that Jencks was going from Providence to Newport, and not coming back; and that in going down, there would, from the very nature of the object, be no solicitation of passengers. That does not necessarily follow; for he might be engaged in making preliminary engagements for the return of some of them back again. But, supposing there were no such solicitations, actual or intended, I do not think the case is essentially changed. I think that the proprietors of the steamboats were not bound to take a passenger from Providence to Newport, whose object was, as a stationed agent of the Tremont line, thereby to acquire facilities to enable him successfully to interfere with the interests of these proprietors, or to do them an injury in their business. Let us take the case of a ferryman. Is he bound to carry a passenger across a ferry, whose object it is to commit a trespass upon his lands? A case still more strongly in point, and which, in my judgment, completely meets the present, is that of an innkeeper. Suppose passengers are accustomed to breakfast, or dine, or sup at his house; and an agent is employed by a rival house, at the distance of a few miles, to decoy the passengers away the moment they arrive at the inn; is the innkeeper bound to entertain and lodge such agent, and thereby enable him to accomplish the very objects of his mission, to the injury or ruin of his own interests? I think not.

It has been also said, that the steamboat proprietors are bound to carry passengers only between Providence and New York, and not to

transport them to Boston. Be it so, that they are not absolutely bound. Yet they have a right to make a contract for this latter purpose, if they choose; and especially if it will facilitate the transportation of passengers, and increase the patronage of their steamboats. I do not say that they have a right to act oppressively in such cases. But certainly they may in good faith make such contracts, to promote their own, as well as the public interests.

The only real question, then, in the present case is, whether the conduct of the steamboat proprietors has been reasonable and *bona fide*. They have entered into a contract with the Citizens' line of coaches to carry all their passengers to and from Boston. Is this contract reasonable in itself; and not designed to create an oppressive and mischievous monopoly? There is no pretence to say that any passenger in the steamboat is bound to go to or from Boston in the Citizens' line. He may act as he pleases. It has been said by the learned counsel for the plaintiff, that free competition is best for the public. But that is not the question here. Men may reasonably differ from each other on that point. Neither is the question here, whether the contract with the Citizens' line was indispensable, or absolutely necessary, in order to ensure the carriage of the passengers to and from Boston. But the true question is, whether the contract is reasonable and proper in itself, and entered into with good faith, and not for the purpose of an oppressive monopoly. If the jury find the contract to be reasonable and proper in itself and not oppressive, and they believe the purpose of Jencks in going on board was to accomplish the objects of his agency, and in violation of the reasonable regulations of the steamboat proprietors, then their verdict ought to be for the defendant; otherwise, to be for the plaintiff.

Webster, for the plaintiff, then requested the Court to charge: That the jury must be satisfied that this agreement was necessary or clearly expedient for the public interest, and the interest of the proprietors of the boats, or otherwise the captain of the boat could not enforce it, by refusing the plaintiff a passage; Or, that the defendant must show that the substantial interest of the proprietors, or of the public, required an arrangement, such as they had entered into, in order to justify their refusal to carry the plaintiff for the cause assigned.

The Court refused to give instruction in the manner and form as prayed; but did instruct the jury, that it is not necessary for the defendant to prove, that the contract in the case was necessary to accomplish the objects therein stated; but it is sufficient, if it was entered into by the steamboat proprietors *bona fide* and purely for the purpose of their own interest, and the accommodation of the public, from their belief of its necessity, or its utility. If the jury should be of opinion that, under all the circumstances of the case, it was a reasonable contract, and the exclusion of the plaintiff was a reasonable and proper regulation to carry it into effect on the part of the steamboat proprietors, then their verdict ought to be in favor of the defendant; otherwise, in favor of the plaintiff. *Verdict for defendant.*

BENNETT *v.* DUTTON.

SUPREME COURT OF NEW HAMPSHIRE, 1839.

[10 *N. H.* 481.]

CASE. The declaration alleged that the defendant was part owner, and driver, of a public stage coach, from Nashua to Amherst and Francestown — that on the 31st January, 1837, the plaintiff applied to him to be received into his coach, at Nashua, and conveyed from thence to Amherst, offering to pay the customary fare; and that the defendant, although there was room in his coach, refused to receive the plaintiff.

It appeared in evidence that at the time of the grievance alleged there were two rival lines of daily stages, running between Lowell, in Massachusetts, and Nashua — that Jonathan B. French was the proprietor of one of these lines, and Nelson Tuttle of the other — that Tuttle's line ran no farther than from Lowell to Nashua — that French and the proprietors of the defendant's line were interested in a contract for carrying the United States mail from Lowell to Francestown, through Amherst (dividing the mail money in proportion to the length of their respective routes), so as to form one continuous mail route from Lowell to Francestown — that French and the proprietors of the defendant's line had agreed to run their respective coaches so as to form a continuous line for passengers from Lowell, through Amherst, to Francestown, and that their agents and drivers might engage seats for the whole distance, at such rates of fare as they thought expedient; and the amount thus received, in instances where they thought proper to receive less than the regular fare, was to be divided between said proprietors, in proportion to the length of their respective routes — that it was also agreed that if the defendant's line brought down to Nashua an extra number of passengers, French should see them through, and be at the expense of furnishing extra coaches and horses, if necessary, to convey them to Lowell; and, on the other hand, if French's line brought up an extra number of passengers from Lowell to Nashua, the proprietors of the defendant's line were to do the same, for the conveyance of such passengers above Nashua — and that it was further agreed (as Tuttle's line ran no farther than from Lowell to Nashua) by the proprietors of the defendant's line, that they would not receive into their coaches, at Nashua, passengers for places above Nashua, who came up from Lowell to Nashua on the same day, in Tuttle's line; the time of starting from Lowell and arriving at Nashua being the same in both lines.

One of the requisitions of mail contracts is, that each line of stage coaches running into another, so as to form a continuous mail line, shall give preference to passengers arriving in the line with which it connects, and shall forward them in preference to any others.

There were several other lines which started from Lowell at the same time with the lines before mentioned, running to other places, through

Nashua; and it was generally the understanding between their respective proprietors that one line should not take, for a part of the distance where the route was the same, passengers who were going on further in another line; though this understanding had been occasionally interrupted.

The plaintiff being at Lowell on the 31st of January, 1837, took passage and was conveyed to Nashua in Tuttle's line; and immediately on his arrival at Nashua applied to be received into the defendant's coach, and tendered the amount of the regular fare. There was room for the plaintiff to be conveyed on to Amherst, but the defendant refused to receive him.

The plaintiff was notified by the agent for the line of French and the defendant, at Lowell, previous to taking passage in Tuttle's coach for Nashua, that if he wished to go from Nashua to Amherst on that day, in the regular mail line, he must take the mail line at Lowell; and that if he took passage in Tuttle's line from Lowell to Nashua he would not be received at Nashua into the defendant's coach.

The parties agreed that judgment should be rendered for the plaintiff for nominal damages, or for the defendant, according to the opinion of this court upon these facts.

Clark & G. Y. Sawyer, for the plaintiff, cited Story on Bailment, 380; 2 Ld. Raym. 909, Coggs *v.* Bernard; Jones on Bailment, 109; 2 Barn. & Adolph. 803, Kent *v.* Shuckard.

Baker (with whom was *C. G. Atherton*), for the defendant. It is not denied that anciently a common carrier was liable for refusing to carry goods; a common innkeeper for refusing to receive a guest; a common ferryman for refusing to carry a passenger; and generally, perhaps, that there was an implied obligation upon every one standing before the public in a particular profession or employment to undertake the duties incumbent upon it; though no case is recollected in which it has been determined that the proprietor of a stage coach is liable for refusing to receive a passenger. 2 Black. 451; 3 Black. 165; 1 Bac. Ab. 554; 1 Vent. 333; 2 Show. 327; Hard. 163; Rob. Ent. 103.

Formerly it was held that where a man was bound to any duty, and chargeable to a certain extent by operation of law, he could not, by any act of his own, discharge himself (1 Esp. R. 36; Noy's Maxims, 92; Doc. & Stud. 270), though it is now well settled that this obligation may be limited.

A liability for refusing to receive a passenger may be qualified by notice. Without notice a common carrier stands in the situation of an insurer. This obligation the law imposes upon him the moment he takes upon himself the duties of carrier. His contract with the public is as an insurer; and if goods are committed to his care while standing in this relation, he is liable as such. 6 Johns. 160; 3 Esp. 127; Selw. N. P. 395; 1 Wils. 181; 1 Inst. 89; 1 T. R. 33, 57; 5 T. R. 389; Story on Bailment, 328; 11 Pick. 42; 4 N. H. Rep. 306.

But this contract, which is general with the public, may be made

special. One who proposes to carry goods may undertake the business, not of a common, but of a special, carrier. He may give notice, when he commences business, that he does not assume all the responsibilities of a common carrier, technically so called; that he will be liable to a certain extent, and upon certain conditions, and no farther. He may thus discharge himself from all responsibility, except perhaps in cases of gross negligence. 3 Stark. 337; 3 Camp. 27; Story on Bail. 338, 357; 3 Taunt. 271; 4 Camp. 41; Jones on Bail. 104; 6 East, 564; 4 Esp. 178; 1 H. Black. 298. But the carrier is not liable for refusing to receive what he is under no obligation to carry (16 East, 244), so that the carrier of goods may not only qualify his responsibility for the safe transportation of goods, but his liability for refusing to receive them.

The principle to be derived from these cases, and upon which they all rest, is, that although the law imposes certain obligations upon one who undertakes the duties of a particular profession or employment, he is at liberty to assume those duties but in part, and thus limit his responsibility, provided he gives notice of his intention, generally, and that notice is brought home to the knowledge of the party interested. The principle is confined to no one branch or department of business; to no one case or class of cases. Nothing more is required than that public notice should be given how far the carrier intends to limit his responsibility, and that it should be known to the person to be affected by it in season to save his interest. The main point is to show the intention of the carrier, and to communicate knowledge of his terms, seasonably, to the individual interested. 5 East, 510; 2 Camp. 108; 1 Stark. Cas. 418; 2 Ditto, 461; 4 Burr. 2298; 1 Str. 145; 1 Bac. Abr. 556; 2 Stark. Ev. 338; 1 Pick. 50. And, provided the intention be manifest, it is not material whether any other person may have known the conditions, except the party whose interest they may affect. 1 Str. 145; 4 Burr. 2298; 2 Stark. Cas. 461.

But, yielding these points, it is contended that the defendant is not liable. It was competent for him to make all such rules and regulations as might be necessary for the convenient and successful prosecution of the employment in which he was engaged. To prosecute this employment, to discharge his duties to the public, and particularly to the post-office department, it became necessary that some such arrangement as this should be made. It was as proper that he should prescribe the place where a passenger should be received as the time when he should be received. It was not a refusal to receive all passengers, or this one in particular, but merely the regulation of the mode in which they would be received. Persons going from Nashua to Francestown were received at Nashua. Persons going from Lowell to Francestown were received at Lowell. This was all that the defendant did. It was a mere regulation; not a refusal to discharge a duty imposed by law.

PARKER, C. J. It is well settled that so long as a common carrier has convenient room he is bound to receive and carry all goods which

are offered for transportation, of the sort he is accustomed to carry, if they are brought at a reasonable time, and in a suitable condition. Story on Bailment, 328; 5 Bing. R. 217, Riley *v.* Horne.

And stage coaches, which transport goods as well as passengers, are, in respect of such goods, to be deemed common carriers, and responsible accordingly. Story, 325.

Carriers of passengers, for hire, are not responsible, in all particulars, like common carriers of goods. They are not insurers of personal safety against all contingencies except those arising from the acts of God and the public enemy. For an injury happening to the person of a passenger by mere accident, without fault on their part, they are not responsible; but are liable only for want of due care, diligence, or skill. This results from the different nature of the case. But in relation to the baggage of their passengers, the better opinion seems to be that they are responsible like other common carriers of goods.

And we are of opinion that the proprietors of a stage coach, for the regular transportation of passengers, for hire, from place to place, are, as in the case of common carriers of goods, bound to take all passengers who come, so long as they have convenient accommodation for their safe carriage, unless there is a sufficient excuse for a refusal. 2 Sumner, 221; Jencks *v.* Coleman; 19 Wend. R. 239.

The principle which requires common carriers of goods to take all that are offered, under the limitations before suggested, seems well to apply.

Like innkeepers, carriers of passengers are not bound to receive all comers. 8 N. H. Rep. 523, Markham *v.* Brown. The character of the applicant, or his condition at the time, may furnish just grounds for his exclusion. And his object at the time may furnish a sufficient excuse for a refusal; as, if it be to commit an assault upon another passenger, or to injure the business of the proprietors.

The case shows the defendant to have been a general carrier of passengers, for hire, in his stage coach, from Nashua to Amherst, at the time of the plaintiff's application. It is admitted there was room in the coach, and there is no evidence that he was an improper person to be admitted, or that he came within any of the reasons of exclusion before suggested.

It has been contended that the defendant was only a special carrier of passengers, and did not hold himself out as a carrier of persons generally; but the facts do not seem to show a holding out for special employment. He was one of the proprietors, and the driver, of a line of stages, from Nashua to Amherst and Francestown. They held themselves out as general passenger carriers between those places. But by reason of their connection with French's line of stages from Lowell to Nashua, they attempted to make an exception of persons who came from Lowell to Nashua in Tuttle's stage, on the same day in which they applied for a passage for the north. It is an attempt to limit their responsibility in a particular case or class of cases, on account of their agreement with French.

It is further contended, that the defendant and other proprietors had a right to make rules for the regulation of their business, and among them a rule that passengers from Lowell to Amherst and onward should take French's stage at Lowell, and that by a notice brought home to the individual the general responsibility of the defendant, if it existed, is limited.

But we are of opinion that the proprietors had no right to limit their general responsibility in this manner.

It has been decided in New York that stage coach proprietors are answerable, as common carriers, for the baggage of passengers, that they cannot restrict their common law liability by a general notice that the baggage of passengers is at the risk of the owners, and that if a carrier can restrict his common law liability, it can only be by an express contract. 19 Wend. 234, Hollister *v.* Nowlen. And this principle was applied, and the proprietors held liable for the loss of a trunk, in a case where the passenger stopped at a place where the stages were not changed, and he permitted the stage to proceed, without any inquiry for his baggage. 19 Wend. 251, Cole *v.* Goodwin. However this may be, as there was room in the defendant's coach, he could not have objected to take a passenger from Nashua, who applied there, merely because he belonged to some other town. That would furnish no sufficient reason, and no rule or notice to that effect could limit his duty. And there is as little legal reason to justify a refusal to take a passenger from Nashua, merely because he came to that place in a particular conveyance. The defendant might well have desired that passengers at Lowell should take French's line, because it connected with his. But if he had himself been the proprietor of the stages from Lowell to Nashua he could have had no right to refuse to take a passenger from Nashua, merely because he did not see fit to come to that place in his stage. It was not for him to inquire whether the plaintiff came to Nashua from one town or another, or by one conveyance or another. That the plaintiff proposed to travel onward from that place could not injuriously affect the defendant's business; nor was the plaintiff to be punished because he had come to Nashua in a particular manner.

The defendant had good right, by an agreement with French, to give a preference to the passengers who came in French's stage; and as they were carriers of the mail on the same route, it seems he was bound so to do, without an agreement. If, after they were accommodated, there was still room, he was bound to carry the plaintiff, without inquiring in what line he came to Nashua.

Judgment for the plaintiff.

PEARSON *v.* DUANE.

SUPREME COURT OF THE UNITED STATES, 1867.

[4 *Wall.* 605.]

IN the month of June, 1856, the steamship Stevens, a common carrier of passengers, of which Pearson was master, on her regular voyage from Panama to San Francisco, arrived at the intermediate port of Acapulco, where Duane got on board, with the intention of proceeding to San Francisco. He had, shortly before this, been banished from that city by a revolutionary yet powerful and organized body of men, called "The Vigilance Committee of San Francisco," upon penalty of death in case of return. Pearson ascertained that Duane had been expelled from California, and put Duane aboard the steamer Sonora. Duane filed a libel in admiralty for damages.[1]

Mr. JUSTICE DAVIS delivered the opinion of the court.

This case is interesting because of certain novel views which this court is asked to sustain.

Two questions arise in it: 1st, was the conduct of Pearson justifiable? 2d, if not, what should be the proper measure of damages? It is contended, as the life of Duane was in imminent peril, in case of his return to San Francisco, that Pearson was justified, in order to save it, in excluding him from his boat, notwithstanding Duane was willing to take his chances of being hanged by the Vigilance Committee.

Such a motive is certainly commendable for its humanity, and goes very far to excuse the transaction, but does not justify it. Common carriers of passengers, like the steamship Stevens, are obliged to carry all persons who apply for passage, if the accommodations are sufficient, unless there is a proper excuse for refusal.[2]

If there are reasonable objections to a proposed passenger, the carrier is not required to take him. In this case, Duane could have been well refused a passage when he first came on board the boat, if the circumstances of his banishment would, in the opinion of the master, have tended to promote further difficulty, should he be returned to a city where lawless violence was supreme.

But this refusal should have preceded the sailing of the ship. After the ship had got to sea, it was too late to take exceptions to the character of a passenger, or to his peculiar position, provided he violated no inflexible rule of the boat in getting on board. This was not done, and the defence that Duane was a "stowaway," and therefore subject to expulsion at any time, is a mere pretence, for the evidence is clear that he made no attempt to secrete himself until advised of his intended transfer to the Sonora. Although a railroad or steamboat company can properly refuse to transport a drunken or insane man, or one whose

[1] The statement of facts has been condensed. — ED.

[2] Jencks *v.* Coleman, 2 Sumner, 221; Bennett *v.* Dutton, 10 New Hampshire, 486.

character is bad, they cannot expel him, after having admitted him as a passenger, and received his fare, unless he misbehaves during the journey.[1] Duane conducted himself properly on the boat until his expulsion was determined, and when his fare was *tendered* to the purser, he was entitled to the same rights as other passengers. The refusal to carry him was contrary to law, although the reason for it was a humane one. The apprehended danger mitigates the act, but affords no legal justification for it.

But the sum of four thousand dollars awarded as damages in this case is excessive, bearing no proportion to the injury received.[2] . . . We are of opinion that the damages should be reduced to $50.

It is ordered that this cause be remitted to the Circuit Court for the District of California, with directions to enter a decree in favor of the appellee for fifty dollars. It is further ordered that each party pay his own costs in this court. *Order accordingly.*

CHICAGO & NORTHWESTERN RAILWAY *v.* WILLIAMS.

SUPREME COURT OF ILLINOIS, 1870.

[55 *Ill.* 185.]

MR. JUSTICE SCOTT delivered the opinion of the court.

There is but one question of any considerable importance presented by the record in this case.

It is simply whether a railroad company, which, by our statute and the common law, is a common carrier of passengers, in a case where the company, by their rules and regulations, have designated a certain car in their passenger train for the exclusive use of ladies, and gentlemen accompanied by ladies, can exclude from the privileges of such car a colored woman holding a first-class ticket, for no other reason except her color.

The evidence in the case establishes these facts — that, as was the custom on appellants' road, they had set apart in their passenger trains a car for the exclusive use of ladies, and gentlemen accompanied by ladies, and that such a car, called the "ladies' car," was attached to the train in question. The appellee resided at Rockford, and being desirous of going from that station to Belvidere, on the road of appellants, for that purpose purchased of the agent of the appellants a ticket, which entitled the holder to a seat in a first-class car on their road. On the arrival of the train at the Rockford station the appellee offered and endeavored to enter the ladies' car, but was refused permission so to do, and was directed to go forward to the car set apart for and occupied mostly by men. On the appellee persisting on entering the ladies'

[1] Coppin *v.* Braithwaite, 8 Jurist, 875; Prendergast *v.* Compton, 8 Carrington and Payne, 462.

[2] The discussion of this point is omitted. — ED.

car, force enough was used by the brakeman to prevent her. At the time she attempted to obtain a seat in that car on appellants' train there were vacant and unoccupied seats in it, for one of the female witnesses states that she, with two other ladies, a few moments afterwards, entered the same car at that station and found two vacant seats, and occupied the same. No objection whatever was made, nor is it insisted any other existed, to appellee taking a seat in the ladies' car except her color. The appellee was clad in plain and decent apparel, and it is not suggested, in the evidence or otherwise, that she was not a woman of good character and proper behavior.

It does not appear that the company had ever set apart a car for the exclusive use, or provided any separate seats for the use of colored persons who might desire to pass over their line of road. The evidence discloses that colored women sometimes rode in the ladies' car, and sometimes in the other car, and there was, in fact, no rule or regulation of the company in regard to colored passengers.

The case turns somewhat on what are reasonable rules, and the power of railroad companies to establish and enforce them.

It is the undoubted right of railroad companies to make all reasonable rules and regulations for the safety and comfort of passengers travelling on their lines of road. It is not only their right, but it is their duty to make such rules and regulations. It is alike the interest of the companies and the public that such rules should be established and enforced, and ample authority is conferred by law on the agents and servants of the companies to enforce all reasonable regulations made for the safety and convenience of passengers.

It was held, in the case of the Ill. Cent. R. R. Co. *v.* Whittemore, 43 Ill. 423, that for a non-compliance with a reasonable rule of the company, a party might be expelled from a train at a point other than a regular station.

If a person on a train becomes disorderly, profane, or dangerous and offensive in his conduct, it is the duty of the conductor to expel such guilty party, or at least to assign him to a car where he will not endanger or annoy the other passengers. Whatever rules tend to the comfort, order, and safety of the passengers, the company are fully authorized to make, and are amply empowered to enforce compliance therewith.

But such rules and regulations must always be reasonable and uniform in respect to persons.

A railroad company cannot capriciously discriminate between passengers on account of their nativity, color, race, social position, or their political or religious beliefs. Whatever discriminations are made must be on some principle, or for some reason, that the law recognizes as just and equitable, and founded in good public policy. What are reasonable rules is a question of law, and is for the court to determine, under all the circumstances in each particular case.

In the present instance the rule that set apart a car for the exclusive

use of ladies, and gentlemen accompanied by ladies, is a reasonable one, and the power of the company to establish it has never been doubted.

If the appellee is to be denied the privilege of the "ladies' car," for which she was willing to pay, and had paid, full compensation to the company, a privilege which is accorded alike to all women, whether they are rich or poor, it must be on some principle or under some rule of the company that the law would recognize as reasonable and just. If she was denied that privilege by the mere caprice of the brakeman and conductor, and under no reasonable rule of the company, or what is still worse, as the evidence would indicate, through mere wantonness on the part of the brakeman, then it was unreasonable, and therefore unlawful. It is not pretended that there was any rule that excluded her, or that the managing officers of the company had ever given any directions to exclude colored persons from that car. If, however, there was such a rule, it could not be justified on the ground of mere prejudice. Such a rule must have for its foundation a better and a sounder reason, and one more in consonance with the enlightened judgment of reasonable men. An unreasonable rule, that affects the convenience and comfort of passengers, is unlawful, simply because it is unreasonable. The State *v.* Overton, 4 Zab. 435.

In the case of the West Chester & Philadelphia R. R. Co. *v.* Miles, 55 Penn. 209, it was admitted that no one could be excluded from a carriage by a public carrier on account of color, religious belief, political relations, or prejudice, but it was held not to be an unreasonable regulation to seat passengers so as to preserve order and decorum and prevent contacts and collisions arising from well-known repugnances, and therefore a rule that required a colored woman to occupy a separate seat in a car furnished by the company, equally as comfortable and safe as that furnished for other passengers, was not an unreasonable rule.

Under some circumstances this might not be an unreasonable rule.

At all events, public carriers, until they do furnish separate seats equal in comfort and safety to those furnished for other travellers, must be held to have no right to discriminate between passengers on account of color, race, or nativity alone.

We do not understand that the appellee was bound to go forward to the car set apart for and occupied mostly by men, when she was directed by the brakeman. It is a sufficient answer to say that that car was not provided by any rule of the company for the use of women, and that another one was. This fact was known to the appellee at the time. She may have undertaken the journey alone, in view of that very fact, as women often do.

The above views dispose of all the objections taken to the instructions given by the court on behalf of the appellee, and the refusal of the court to give those asked on the part of the appellants, except the one which tells the jury that they may give damages above the actual damages sustained, for the delay, vexation, and indignity to which the ap-

pellee was exposed if she was wrongfully excluded from the car. If the party in such case is confined to the actual pecuniary damages sustained, it would, most often, be no compensation at all, above nominal damages, and no salutary effect would be produced on the wrong doer by such a verdict. But we apprehend that if the act is wrongfully and wantonly committed, the party may recover, in addition to the actual damages, something for the indignity, vexation, and disgrace to which the party has been subjected.

It is insisted that the damages are excessive, in view of the slight injury sustained.

There is evidence from which the jury could find that the brakeman treated the appellee very rudely, and placed his hand on her and pushed her away from the car. The act was committed in a public place, and whatever disgrace was inflicted on her was in the presence of strangers and friends. The act was, in itself, wrongful, and without the shadow of a reasonable excuse, and the damages are not too high. The jury saw the witnesses, and heard their testimony, and with their finding we are fully satisfied.

Perceiving no error in the record, the judgment is affirmed.

Judgment affirmed.

THE D. R. MARTIN.

CIRCUIT COURT OF THE UNITED STATES, SO. NEW YORK, 1873.

[11 *Blatch.* 233.]

HUNT, J. On the trial before the District Judge, the libellant, David F. Barney, recovered the sum of $1,000, as his damages for ejecting him from the steamboat D. R. Martin, on the morning of October 23, 1871. On an application subsequently made to him, the District Judge reduced the recovery to the sum of $500. A careful perusal of all the testimony satisfies me that the libellant was pursuing his business as an express agent on board of the boat, that he persisted in it against the remonstrance of the claimant, and that it was to prevent the transaction of that business by him on board of the boat, that he was ejected therefrom by the claimant. The steamboat company owning this vessel were common carriers between Huntington and New York. They were bound to transport every passenger presenting himself for transportation, who was in a fit condition to travel by such conveyance. They were bound, also, to carry all freight presented to them in a reasonable time before their hours of starting. The capacity of their accommodation was the only limit to their obligation. A public conveyance of this character is not, however, intended as a place for the transaction of the business of the passengers. The suitable carriage of persons or property is the only duty of the common carrier. A steamboat company, or a railroad company, is not bound to furnish travelling conveniences for those who wish to engage, on their vehicles, in the business

of selling books, papers, or articles of food, or in the business of receiving and distributing parcels or baggage, nor to permit the transaction of this business in their vehicles, when it interferes with their own interests. If a profit may arise from such business, the benefit of it belongs to the company, and they are entitled to the exclusive use of their vehicles for such purposes. This seems to be clear both upon principle and authority. (Story on Bailments, § 591*a*; Jencks *v.* Coleman, 2 Sumner, 221; Burgess *v.* Clements, 4 Maule & Sel., 306; Fell *v.* Knight, 8 Mee. & W., 269; Commonwealth *v.* Power, 1 Am. Railway Cases, 389.) These cases show that the principle thus laid down is true as a general rule. The case of The N. J. Steam Nav. Co. *v.* Merchants' Bank (6 How. 344) shows that it is especially applicable to those seeking to do an express business on such conveyances. It is there held, in substance, that the carrier is liable to the owner for all the goods shipped on a public conveyance by an express company, without regard to any contract to the contrary between the carrier and the express company. Although the carrier may have no custody or control of the goods, he is liable to the owner in case of loss, if he allows them to be brought on board. It is the simplest justice that he should be permitted to protect himself by preventing their being brought on board by those having them in charge. This rule would not exclude the transmission, as freight, of any goods or property which the owners or agents should choose to place under the care and control of the carrier.

That persons other than the libellants carried a carpet bag without charge, or that such bag occasionally contained articles forwarded by a neighbor or procured for a friend, does not affect the carrier's right. The cases where this was proved to have been done were rare and exceptional, and do not appear to have been known to the carrier, nor does it appear that any compensation was paid to the agent. They were neighborly and friendly services, such as people in the country are accustomed to render for each other. But, if the service and the business had been precisely like that of the libellant the rule would have been the same. The rights of the carrier in respect to A. are not gone or impaired, for the reason that he waives his rights in respect to B., especially if A. be notified that the rights are insisted upon as to him. If Mr. Prime was permitted to carry a bag without charge on the claimant's boat, or to do a limited express business thereon, this gave the libellant no right to do such business, when notified by the carrier that he must refrain from it. A carrier, like all others, may bestow favor where he chooses. Rights, not favors, are the subject of demand by all parties indiscriminately. The incidental benefit arising from the transaction of such business as may be done on board of a boat or on a car, belongs to the carrier, and he can allow the privilege to one and exclude from it another, at his pleasure. A steamboat company or a railroad company, may well allow an individual to open a restaurant or a bar on their conveyance, or to do the business of boot

blacking, or of peddling books and papers. This individual is under their control, subject to their regulation, and the business interferes in no respect with the orderly management of the vehicle. But if every one that thinks fit can enter upon the performance of these duties, the control of the vehicle and its good management would soon be at an end. The cars or boats are those of the carrier, and, I think, exclusively his, for this purpose. The sale or leasing of these rights to individuals, and the exclusion of others therefrom, come under the head of reasonable regulations, which the courts are bound to enforce. The right of transportation, which belongs to all who desire it, does not carry with it a right of traffic or of business.

It is insisted that the libellant could not legally be ejected from the boat for any offence, or violation of rules, committed on a former occasion. It is insisted, also, that, having purchased a ticket from the agent of the company, his right to a passage was perfect. Neither of these propositions is correct. In Commonwealth *v.* Power, (7 Met. 596,) the passenger had actually purchased his ticket, and the Chief Justice says: "If he, Hall, gave no notice of his intention to enter the car as a passenger, and of his right to do so, and if Power believed that his intention was to violate a reasonable subsisting regulation, then he and his assistants were justified in forcibly removing him from the depot." In Pearson *v.* Duane, (4 Wallace, 605,) Mr. Justice Davis, in giving the opinion of the court, held the expulsion of Duane to have been illegal, because it was delayed until the vessel had sailed. "But this refusal," he says, "should have preceded the sailing of the ship. After the ship had got to sea, it was too late to take exceptions to the character of a passenger, or to his peculiar position, provided he violated no inflexible rule of the boat in getting on board." The libellant, in this case, refused to give any intimation that he would abandon his trade on board the vessel. The steamboat company, it is evident, were quite willing to carry him and his baggage, and objected only to his persistent attempts to continue his traffic on their boat. He insisted that he had the right to pursue it, and the company resorted to the only means in their power to compel its abandonment, to wit, his removal from the boat. This was done with no unnecessary force, and was accompanied by no indignity. In my opinion, the removal was justified, and the decree must be reversed.[1]

BROWN *v.* MEMPHIS & C. RAILROAD.

CIRCUIT COURT OF THE UNITED STATES, W. TENN., 1880.

[5 *Fed.* 499.]

THIS was a common-law action for the wrongful exclusion of the plaintiff, a colored woman, from the ladies' car of the defendant's train, upon her refusal to take a seat in the smoking-car. At the time of her

[1] *Acc.* Barney *v.* Oyster Bay & H. S. B. Co., 67 N. Y. 301. — ED.

exclusion the plaintiff held a first-class ticket over the defendant's road from Corinth, Mississippi, to Memphis, Tennessee, and her behavior while in the car was lady-like and inoffensive.[1]

The defendant pleaded that the plaintiff was a notorious and public courtesan, addicted to the use of profane language and offensive habits of conduct in public places; that the ladies' car was set apart exclusively for the use of genteel ladies of good character and modest deportment, from which the plaintiff was rightfully excluded because of her bad character.

HAMMOND, District Judge, charged the jury that the same principles of law were to be applied to women as men in determining whether the exclusion was lawful or not; that the social penalties of exclusion of unchaste women from hotels, theatres, and other public places could not be imported into the law of common carriers; that they had a right to travel in the streets and on the public highways, and other people who travel must expect to meet them in such places; and, as long as their conduct was unobjectionable while in such places, they could not be excluded. The carrier is bound to carry good, bad, and indifferent, and has nothing to do with the morals of his passengers, if their behavior be proper while travelling. Neither can the carrier use the character for chastity of his female passengers as a basis of classification, so that he may put all chaste women, or women who have the reputation of being chaste, into one car, and those known or reputed to be unchaste in another car. Such a regulation would be contrary to public policy, and unreasonable. It would put every woman purchasing a railroad ticket on trial for her virtue before the conductor as her judge, and, in case of mistake, would lead to breaches of the peace. It would practically exclude all sensible and sensitive women from travelling at all, no matter how virtuous, for fear they might be put into or unconsciously occupy the wrong car.[2]

The police power of the carrier is sufficient protection to other passengers, and he can remove all persons, men or women, whose conduct at the time is annoying, or whose reputation for misbehavior and indecent demeanor in public is so notoriously bad that it furnishes a reasonable ground to believe that the person will be offensive or annoying to others travelling in the same car; and this is as far as the carrier has any right to go. He can no more classify women according to their reputation for chastity, or want of it, than he can so grade the men. *Verdict for the plaintiff.*

[1] Part of the statement of facts and part of the charge are omitted. — ED.

[2] See Brown *v.* R. R., 4 Fed. 37. — ED.

McDUFFEE *v.* PORTLAND AND ROCHESTER RAILROAD.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE, 1873.

[52 *N. H.* 430.]

CASE, by Daniel McDuffee against the Portland & Rochester Railroad, for not furnishing the plaintiff terms, facilities, and accommodations for his express business on the defendants' road, between Rochester, N. H., and Portland, Me., reasonably equal to those furnished by the defendants to the Eastern Express Company.

The defendants demurred to the declaration.[1]

DOE, J. I. A common carrier is a public carrier. He engages in a public employment, takes upon himself a public duty, and exercises a sort of public office. Sandford *v.* R. Co., 24 Pa. St. 378, 381; N. J. S. N. Co. *v.* Merchants' Bank, 6 How. 344, 382; Shelden *v.* Robinson, 7 N. H. 157, 163, 164; Gray *v.* Jackson, 51 N. H. 9, 10; Ansell *v.* Waterhouse, 2 Chitty, 1, 4; Hollister *v.* Nowlen, 19 Wend. 234, 239. He is under a legal obligation: others have a corresponding legal right. His duty being public, the correlative right is public. The public right is a common right, and a common right signifies a reasonably equal right. "There are certain cases in which, if individuals dedicate their personal services, or the temporary use of their property, to the public, the law will impose certain duties upon them, and regulate their proceedings to a certain extent. Thus, a common carrier is bound by law, if he have conveniences for the purpose, to carry for a reasonable compensation." Olcott *v.* Banfill, 4 N. H. 537, 546. "He [the common carrier] holds a sort of official relation to the public. He is bound to carry at reasonable rates such commodities as are in his line of business, for all persons who offer them, as early as his means will allow. He cannot refuse to carry a proper article, tendered to him at a suitable time and place, on the offer of the usual reasonable compensation. Story on Bailments, sec. 508; Riley *v.* Horne, 5 Bing. 217, 224; Bennett *v.* Dutton, 10 N. H. 486. When he undertakes the business of a common carrier, he assumes this relation to the public, and he is not at liberty to decline the duties and responsibilities of his place, as they are defined and fixed by law." Moses *v.* B. & M. R. R., 24 N. H. 71, 88, 89. On this ground it was held, in that case, that a common carrier could not, by a public notice, discharge himself from the legal responsibility pertaining to his office, or from performing his public duty in the way and on the terms prescribed by law.

"The very definition of a common carrier excludes the idea of the right to grant monopolies, or to give special and unequal preferences. It implies indifference as to whom they may serve, and an equal readiness to serve all who may apply, and in the order of their application." N. E. Express Co. *v.* M. C. R. R. Co., 57 Me. 188, 196. A common

[1] Arguments of counsel are omitted. — ED.

carrier of passengers cannot exercise an unreasonable discrimination in carrying one and refusing to carry another. Bennett v. Dutton, 10 N. H. 481. A common carrier of freight cannot exercise an unreasonable discrimination in carrying for one and refusing to carry for another. He may be a common carrier of one kind of property, and not of another; but, as to goods of which he is a common carrier, he cannot discriminate unreasonably against any individual in the performance of the public duty which he assumed when he engaged in the occupation of carrying for all. His service would not be public if, out of the persons and things in his line of business, he could arbitrarily select whom and what he would carry. Such a power of arbitrary selection would destroy the public character of his employment, and the rights which the public acquired when he volunteered in the public service of common-carrier transportation. With such a power, he would be a carrier, — a special, private carrier, — but not a common, public one. From the public service — which he entered of his own accord — he may retire, ceasing to be a common carrier, with or without the public consent, according to the law applicable to his case; but, as long as he remains in the service, he must perform the duties appertaining to it. The remedies for neglect or violation of duty in the civil service of the State are not the same as in the military service; but the public rights of having the duties of each performed are much the same, and, in the department now under consideration, ample remedies are not wanting. The right to the transportation service of a common carrier is a common as well as a public right, belonging to every individual as well as to the State. A right of conveyance, unreasonably and injuriously preferred and exclusive, and made so by a special contract of the common carrier, is not the common, public right, but a violation of it. And when an individual is specially injured by such a violation of the common right which he is entitled to enjoy, he may have redress in an action at common law. The common carrier has no cause to complain of his legal responsibility. It was for him to consider as well the duty as the profit of being a public servant, before embarking in that business. The profit could not be considered without taking the duty into account, for the rightful profit is the balance of compensation left after paying the expenses of performing the duty. And he knew beforehand, or ought to have known, that if no profit should accrue, the performance of the duty would be none the less obligatory until he should be discharged from the public service. Taylor v. Railway, 48 N. H. 304, 317. The chances of profit and loss are his risks, being necessary incidents of his adventure, and for him to judge of before devoting his time, labor, care, skill, and capital to the service of the country. Profitable or unprofitable, his condition is that of one held to service, having by his own act, of his own free will, submitted himself to that condition, and not having liberated himself, nor been released, from it.

A common carrier cannot directly exercise unreasonable discrimination as to whom and what he will carry. On what legal ground can

he exercise such discrimination indirectly? He cannot, without good reason, while carrying A, unconditionally refuse to carry B. On what legal ground can he, without good reason, while providing agreeable terms, facilities, and accommodations for the conveyance of A and his goods, provide such disagreeable ones for B that he is practically compelled to stay at home with his goods, deprived of his share of the common right of transportation? What legal principle, guaranteeing the common right against direct attack, sanctions its destruction by a circuitous invasion? As no one can infringe the common right of travel and commercial intercourse over a public highway, on land or water, by making the way absolutely impassable, or rendering its passage unreasonably unpleasant, unhealthy, or unprofitable, so a common carrier cannot infringe the common right of common carriage, either by unreasonably refusing to carry one or all, for one or for all, or by imposing unreasonably unequal terms, facilities, or accommodations, which would practically amount to an embargo upon the travel or traffic of some disfavored individual. And, as all common carriers combined cannot, directly or indirectly, destroy or interrupt the common right by stopping their branch of the public service while they remain in that service, so neither all of them together nor one alone can, directly or indirectly, deprive any individual of his lawful enjoyment of the common right. Equality, in the sense of freedom from unreasonable discrimination, being of the very substance of the common right, an individual is deprived of his lawful enjoyment of the common right when he is subjected to unreasonable and injurious discrimination in respect to terms, facilities, or accommodations. That is not, in the ordinary legal sense, a public highway, in which one man is unreasonably privileged to use a convenient path, and another is unreasonably restricted to the gutter; and that is not a public service of common carriage, in which one enjoys an unreasonable preference or advantage, and another suffers an unreasonable prejudice or disadvantage. A denial of the entire right of service by a refusal to carry, differs, if at all, in degree only, and the amount of damage done, and not in the essential legal character of the act, from a denial of the right in part by an unreasonable discrimination in terms, facilities, or accommodations. Whether the denial is general by refusing to furnish any transportation whatever, or special by refusing to carry one person or his goods; whether it is direct by expressly refusing to carry, or indirect by imposing such unreasonable terms, facilities, or accommodations as render carriage undesirable; whether unreasonableness of terms, facilities, or accommodations operates as a total or a partial denial of the right; and whether the unreasonableness is in the intrinsic, individual nature of the terms, facilities, or accommodations, or in their discriminating, collective, and comparative character, — the right denied is one and the same common right, which would not be a right if it could be rightfully denied, and would not be common, in the legal sense, if it could be legally subjected to unreasonable discrimination,

and parcelled out among men in unreasonably superior and inferior grades at the behest of the servant from whom the service is due.

The commonness of the right necessarily implies an equality of right, in the sense of freedom from unreasonable discrimination; and any practical invasion of the common right by an unreasonable discrimination practised by a carrier held to the common service is insubordination and mutiny, for which he is liable, to the extent of the damage inflicted, in an action of case at common law. The question of reasonableness of price may be something more than the question of actual cost and value of service. If the actual value of certain transportation of one hundred barrels of flour, affording a reasonable profit to the carrier, is one hundred dollars; if, all the circumstances that ought to be considered being taken into account, that sum is the price which ought to be charged for that particular service; and if the carrier charges everybody that price for that service, there is no encroachment on the common right. But if for that service the carrier charges one flour merchant one hundred dollars, and another fifty dollars, the common right is as manifestly violated as if the latter were charged one hundred dollars, and the former two hundred. What kind of a common right of carriage would that be which the carrier could so administer as to unreasonably, capriciously, and despotically enrich one man and ruin another? If the service or price is unreasonable and injurious, the unreasonableness is equally actionable, whether it is in inequality or in some other particular. A service or price that would otherwise be reasonable may be made unreasonable by an unreasonable discrimination, because such a discrimination is a violation of the common right. There might be cases where persons complaining of such a violation would have no cause of action, because they would not be injured. There might be cases where the discrimination would be injurious; in such cases it would be actionable. There might be cases where the remedy by civil suit for damages at common law would be practically ineffectual on account of the difficulty of proving large damages, or the incompetence of a multiplicity of such suits to abate a continued grievance, or for other reasons; in such cases there would be a plain and adequate remedy, where there ought to be one, by the re-enforcing operation of an injunction, or by indictment, information, or other common, familiar, and appropriate course of law.

The common and equal right is to reasonable transportation service for a reasonable compensation. Neither the service nor the price is necessarily unreasonable because it is unequal, in a certain narrow, strict, and literal sense; but that is not a reasonable service, or a reasonable price, which is unreasonably unequal. The question is not merely whether the service or price is absolutely unequal, in the narrowest sense, but also whether the inequality is unreasonable and injurious. There may be acts of charity; there may be different prices for different kinds or amounts of service; there may be many differences of price and service, entirely consistent with the general prin-

ciple of reasonable equality which distinguishes the duty of a common carrier in the legal sense from the duty of a carrier who is not a common one in that sense. A certain inequality of terms, facilities, or accommodations may be reasonable, and required by the doctrine of reasonableness, and therefore not an infringement of the common right. It may be the duty of a common carrier of passengers to carry under discriminating restrictions, or to refuse to carry those who, by reason of their physical or mental condition, would injure, endanger, disturb, or annoy other passengers; and an analogous rule may be applicable to the common carriage of goods. Healthy passengers in a palatial car would not be provided with reasonable accommodations if they were there unreasonably and negligently exposed by the carrier to the society of small-pox patients. Sober, quiet, moral, and sensitive travellers may have cause to complain of their accommodations if they are unreasonably exposed to the companionship of unrestrained, intoxicated, noisy, profane, and abusive passengers, who may enjoy the discomfort they cast upon others. In one sense, both classes, carried together, might be provided with equal accommodations; in another sense, they would not. The feelings not corporal, and the decencies of progressive civilization, as well as physical life, health, and comfort, are entitled to reasonable accommodations. 2 Greenl. Ev. sec. 222 *a;* Bennett *v.* Dutton, 10 N. H. 481, 486. Mental and moral sensibilities, unreasonably wounded, may be an actual cause of suffering, as plain as a broken limb; and if the injury is caused by unreasonableness of facilities or accommodations (which is synonymous with unreasonableness of service), it may be as plain a legal cause of action as any bodily hurt, commercial inconvenience, or pecuniary loss. To allow one passenger to be made uncomfortable by another committing an outrage, without physical violence, against the ordinary proprieties of life and the common sentiments of mankind, may be as clear a violation of the common right, and as clear an actionable neglect of a common carrier's duty, as to permit one to occupy two seats while another stands in the aisle. Although reasonableness of service or price may require a reasonable discrimination, it does not tolerate an unreasonable one; and the law does not require a court or jury to waste time in a useless investigation of the question whether a proved injurious unreasonableness of service or price was in its intrinsic or in its discriminating quality. The main question is, not whether the unreasonableness was in this or in that, but whether there was unreasonableness, and whether it was injurious to the plaintiff.

This question may be made unnecessarily difficult by an indefiniteness, confusion, and obscurity of ideas that may arise when the public duty of a common carrier, and the correlative common right to his reasonable service for a reasonable price, are not clearly and broadly distinguished from a matter of private charity. If A receives, as a charity, transportation service without price, or for less than a reasonable price, from B, who is a common carrier, A does not receive it as

his enjoyment of the common right; B does not give it as a performance of his public duty; C, who is required to pay a reasonable price for a reasonable service, is not injured; and the public, supplied with reasonable facilities and accommodations on reasonable terms, cannot complain that B is violating his public duty. There is, in such a case, no discrimination, reasonable or unreasonable, in that reasonable service for a reasonable price which is the common right. A person who is a common carrier may devote to the needy, in any necessary form of relief, all the reasonable profits of his business. He has the same right that any one else has to give money or goods or transportation to the poor. But it is neither his legal duty to be charitable at his own expense, nor his legal right to be charitable at the expense of those whose servant he is. If his reasonable compensation for certain carriage is one hundred dollars, and his just profit, not needed in his business, is one tenth of that sum, he has ten dollars which he may legally use for feeding the hungry, clothing the naked, or carrying those in poverty to whom transportation is one of the necessaries of life, and who suffer for lack of it. But if he charges the ten dollars to those who pay him for their transportation, if he charges them one hundred and ten dollars for one hundred dollars' worth of service, he is not benevolent himself, but he is undertaking to compel those to be benevolent who are entitled to his service; he is violating the common right of reasonable terms, which cannot be increased by compulsory contributions for any charitable purpose. So, if he carries one or many for half the reasonable price, and reimburses himself by charging others more than the reasonable price, he is illegally administering, not his own, but other people's charity. And when he attempts to justify an instance of apparent discrimination on the ground of charity, it may be necessary to ascertain whose charity was dispensed, — whether it was his, or one forced by him from others, including the party complaining of it. But it will not be necessary to consider this point further until there is some reason to believe that what the plaintiff complains of is defended as an act of disinterested benevolence performed by the railroad at its own expense.

In Garton *v.* B. & E. R. Co., 1 B. & S. 112, 154, 165, when it was not found that any unreasonable inequality had been made by the defendants to the detriment of the plaintiffs, it was held that a reasonable price paid by them was not made unreasonable by a less price paid by others, — a proposition sufficiently plain, and expressed by CROMPTON, J., in another form, when he said to the plaintiffs' counsel during the argument of that case: "The charging another person too little is not charging you too much." The proposition takes it for granted that it has been settled that the price paid by the party complaining was reasonable, — a conclusion that settles the whole controversy as to that price. But before that conclusion is reached, it may be necessary to determine whether the receipt of a less price from another person was a matter of charity, or an unreasonable discrimi-

nation and a violation of the common right. Charging A less than B for the same service, or service of the same value, is not of itself necessarily charging A too little, or charging B too much; but it may be evidence tending to show that B is charged too much, either by being charged more than the actual value of the service, or by being made the victim of an unjustifiable discrimination. The doctrine of reasonableness is not to be overturned by a conclusive presumption that every inequality of price is the work of alms-giving, dictated by a motive of humanity. If an apparent discrimination turns out, on examination, to have been, not a discrimination in the performance of the public duty, but a private charity, there is an end of the case. But if an apparent discrimination is found to have been a real one, the question is whether it was reasonable, and, if unreasonable, whether the party complaining was injured by it.

In some cases, this may be an inquiry of some difficulty in each of its branches. But such difficulty as there may be will arise from the breadth of the inquiry, the intricate nature of the matter to be investigated, the circumstantial character of the evidence to be weighed, and the application of the legal rule to the facts, and not from any want of clearness or certainty in the general principle of the common law applicable to the subject. The difficulty will not be in the common law, and cannot be justly overcome by altering that law. The inquiry may sometimes be a broad one, but it will never be broader than the justice of the case requires. A narrow view that would be partial cannot be taken; a narrow test of right and wrong that would be grossly inequitable cannot be adopted. If the doctrine of reasonableness is not the doctrine of justice, it is for him who is dissatisfied with it to show its injustice; if it is the doctrine of justice, it is for him to show the grounds of his discontent.

The decision in N. E. Express Co. *v.* M. C. R. Co., 57 Me. 188, satisfactorily disposed of the argument, vigorously and ably pressed by the defendants in that case, that a railroad, carrying one expressman and his freight on passenger trains, on certain reasonable conditions, but under an agreement not to perform a like service for others, does not thereby hold itself out as a common carrier of expressmen and their freight on passenger trains, on similar conditions. So far as the common right of mere transportation is concerned, and without reference to the peculiar liability of a common carrier of goods as an insurer, such an arrangement would, necessarily and without hesitation, be found, by the court or the jury, to be an evasion. A railroad corporation, carrying one expressman, and enabling him to do all the express business on the line of their road, do hold themselves out as common carriers of expresses; and when they unreasonably refuse, directly or indirectly, to carry any more public servants of that class, they perform this duty with illegal partiality. The legal principle, which establishes and secures the common right, being the perfection of reason, the right is not a mere nominal one. and is in no danger of being destroyed by

a quibble. If there could possibly be a case in which the exclusive arrangement in favor of one expressman would not be an evasion of the common-law right, the question might arise whether, under our statute law (Gen. Stats. chs. 145, 146, 149, 150), public railroad corporations are not common carriers (at least to the extent of furnishing reasonable facilities and accommodations of transportation on reasonable terms) of such passengers and such freight as there is no good reason for their refusing to carry.

The public would seem to have reason to claim that the clause of Gen. Stats. ch. 146, sec. 1, — "Railroads being designed for the public accommodation, like other highways, are public," — is a very comprehensive provision; that public agents, taking private property for the public use, are bound to treat all alike (that is, without unreasonable preference) so far as the property is used, or its use is rightfully demanded, by the public for whose use it was taken; and that, in a country professing to base its institutions on the natural equality of men in respect to legal rights and remedies, it cannot be presumed that the legislature intended, in the charter of a common carrier, to grant an implied power to create monopolies in the express business, or in any other business, by undue and unreasonable discriminations. There would seem to be great doubt whether, upon any fair construction of general or special statutes, a common carrier, incorporated in this country, could be held to have received from the legislature the power of making unreasonable discriminations and creating monopolies, unless such power were conferred in very explicit terms. And, if such power were attempted to be conferred, there would be, in this State, a question of the constitutional authority of the legislature to convey a prerogative so hostile to the character of our institutions and the spirit of the organic law. But, resting the decision of this case, as we do, on the simple, elementary, and unrepealed principle of the common law, equally applicable to individuals and corporations, we have no occasion, at present, to go into these other inquiries.[1]

Case discharged.[2]

[1] The rest of the opinion is omitted. — Ed.

[2] "An express company engaged in the business of transporting small packages has as good a right to the benefits of the railroad as the owners of the packages possess in person. It is impossible that they can all appear in person to claim their rights, and it is sufficient that they are represented by agents who are intrusted with their goods, and have a special property in them. The business of carrying what is called "express matter" has recently grown up, and is productive of great public advantage. The objection to carrying such matters, on the ground of the novelty of the business, has nothing in it deserving serious consideration. If all the improvements of this progressive age are to be excluded from railroad transportation because they were not in existence when the charters were granted for the roads, the public would soon be deprived of the chief value of these important works. The law is not so unreasonable in its constructions. The rights of express agents or carriers have been fully recognized in this respect in England. They are entitled to equal benefits with others, and no exclusive advantages can be granted to others to their injury. Pickford *v.* G. J. Ry., 10 M. & W. 397; Parker *v.* G. W. Ry., 7 M. & G. 253; Parker *v.* G. W. Ry., 11 C. B. 545, 583." — Lewis, C. J., in Sandford *v.* R. R., 24 Pa. 378.

Acc. New Eng. Exp. Co. *v.* R. R., 57 Me. 188. — Ed.

THE EXPRESS CASES.

SUPREME COURT OF THE UNITED STATES, 1886.

[117 *U. S.* 1.]

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.[1]

These suits present substantially the same questions and may properly be considered together. They were each brought by an express company against a railway company to restrain the railway company from interfering with or disturbing in any manner the facilities theretofore afforded the express company for doing its business on the railway of the railway company. . . . The evidence shows that the express business was first organized in the United States about the year 1839. . . . It has become a public necessity, and ranks in importance with the mails and with the telegraph. It employs for the purposes of transportation all the important railroads in the United States, and a new road is rarely opened to the public without being equipped in some form with express facilities. It is used in almost every conceivable way, and for almost every conceivable purpose, by the people and by the government. All have become accustomed to it, and it cannot be taken away without breaking up many of the long settled habits of business, and interfering materially with the conveniences of social life.

In this connection it is to be kept in mind that neither of the railroad companies involved in these suits is attempting to deprive the general public of the advantages of an express business over its road. The controversy, in each case, is not with the public but with a single express company. And the real question is not whether the railroad companies are authorized by law to do an express business themselves; nor whether they must carry express matter for the public on their passenger trains, in the immediate charge of some person specially appointed for that purpose; nor whether they shall carry express freights for express companies as they carry like freights for the general public; but whether it is their duty to furnish the Adams Company or the Southern Company facilities for doing an express business upon their roads the same in all respects as those they provide for themselves or afford to any other express company.

When the business began railroads were in their infancy. They were few in number, and for comparatively short distances. There has never been a time, however, since the express business was started that it has not been encouraged by the railroad companies, and it is no doubt true, as alleged in each of the bills filed in these cases, that "no railroad company in the United States . . . has ever refused to transport express matter for the public, upon the application of some express company of some form of legal constitution. Every railway

[1] Part of the opinion is omitted. — ED.

company . . . has recognized the right of the public to demand transportation by the railway facilities which the public has permitted to be created, of that class of matter which is known as express matter." Express companies have undoubtedly invested their capital and built up their business in the hope and expectation of securing and keeping for themselves such railway facilities as they needed, and railroad companies have likewise relied upon the express business as one of their important sources of income.

But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers. On the contrary it has been shown, and in fact it was conceded upon the argument, that, down to the time of bringing these suits, no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and the duties of the respective parties were carefully fixed and defined. These contracts, as is seen by those in these records, vary necessarily in their details, according to the varying circumstances of each particular case, and according to the judgment and discretion of the parties immediately concerned. It also appears that, with very few exceptions, only one express company has been allowed by a railroad company to do business on its road at the same time. In some of the States, statutes have been passed which, either in express terms or by judicial interpretation, require railroad companies to furnish equal facilities to all express companies, Gen. Laws N. H., 1878, ch. 163, § 2; Rev. Stat. Maine, 1883, 494, ch. 51, § 134; but these are of comparative recent origin, and thus far seem not to have been generally adopted. . . .

The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had for the most part on passenger trains. It requires not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employé of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive possession of the expressman in charge. As the business to be done is "express," it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. Railroad companies are by law carriers of both persons and property. Passenger trains have from the beginning been provided for the transportation primarily of passengers and their baggage. This must be done with reasonable promptness and with reasonable comfort to the passenger. The express business on passenger trains is in a degree subordinate to the passenger business, and it is consequently

the duty of a railroad company in arranging for the express to see that there is as little interference as possible with the wants of passengers. This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. All this must necessarily be a matter of bargain, and it by no means follows that, because a railroad company can serve one express company in one way, it can as well serve another company in the same way, and still perform its other obligations to the public in a satisfactory manner. The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control. No express company can do a successful business unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasions when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security.

The inconvenience that would come from allowing more than one express company on a railroad at the same time was apparently so well understood both by the express companies and the railroad companies that the three principal express companies, the Adams, the American, and the United States, almost immediately on their organization, now more than thirty years ago, by agreement divided the territory in the United States traversed by railroads among themselves, and since that time each has confined its own operations to the particular roads which, under this division, have been set apart for its special use. No one of these companies has ever interfered with the other, and each has worked its allotted territory, always extending its lines in the agreed directions as circumstances would permit. At the beginning of the late civil war the Adams Company gave up its territory in the Southern States to the Southern Company, and since then the Adams and the Southern have occupied, under arrangements between themselves, that part of the ground originally assigned to the Adams alone. In this way these three or four important and influ-

ential companies were able substantially to control, from 1854 until about the time of the bringing of these suits, all the railway express business in the United States, except upon the Pacific roads and in certain comparatively limited localities. In fact, as is stated in the argument for the express companies, the Adams was occupying when these suits were brought, one hundred and fifty-five railroads, with a mileage of 21,216 miles, the American two hundred roads, with a mileage of 28,000 miles, and the Southern ninety-five roads, with a mileage of 10,000 miles. Through their business arrangements with each other, and with other connecting lines, they have been able for a long time to receive and contract for the delivery of any package committed to their charge at almost any place of importance in the United States and in Canada, and even at some places in Europe and the West Indies. They have invested millions of dollars in their business, and have secured public confidence to such a degree that they are trusted unhesitatingly by all who need their services. The good will of their business is of very great value, if they can keep their present facilities for transportation. The longer their lines and the more favorable their connections, the greater will be their own profits, and the better their means of serving the public. In making their investments and in extending their business, they have undoubtedly relied on securing and keeping favorable railroad transportation, and in this they were encouraged by the apparent willingness of railroad companies to accommodate them; but the fact still remains that they have never been allowed to do business on any road except under a special contract, and that as a rule only one express company has been admitted on a road at the same time.

The territory traversed by the railroads involved in the present suits is part of that allotted in the division between the express companies to the Adams and Southern companies, and in due time after the roads were built these companies contracted with the railroad companies for the privileges of an express business. The contracts were all in writing, in which the rights of the respective parties were clearly defined, and there is now no dispute about what they were. Each contract contained a provision for its termination by either party on notice. That notice has been given in all the cases by the railroad companies, and the express companies now sue for relief. Clearly this cannot be afforded by keeping the contracts in force, for both parties have agreed that they may be terminated at any time by either party on notice; nor by making new contracts, because that is not within the scope of judicial power.

The exact question, then, is whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when

offered in the way that passengers and freight are carried. The contracts which these companies once had are now out of the way, and the companies at this time possess no other rights than such as belong to any other company or person wishing to do an express business upon these roads. If they are entitled to the relief they ask it is because it is the duty of the railroad companies to furnish express facilities to all alike who demand them.

The constitutions and the laws of the States in which the roads are situated place the companies that own and operate them on the footing of common carriers, but there is nothing which in positive terms requires a railroad company to carry all express companies in the way that under some circumstances they may be able without inconvenience to carry one company. In Kansas, the Missouri, Kansas, and Texas Company must furnish sufficient accommodations for the transportation of all such express freight as may be offered, and in each of the States of Missouri, Arkansas, and Kansas railroad companies are probably prohibited from making unreasonable discriminations in their business as carriers, but this is all.

Such being the case, the right of the express companies to a decree depends upon their showing the existence of a usage, having the force of law in the express business, which requires railroad companies to carry all express companies on their passenger trains as express carriers are usually carried. It is not enough to establish a usage to carry some express company, or to furnish the public in some way with the advantages of an express business over the road. The question is not whether these railroad companies must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines.

In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads unless specially contracted for. While it has uniformly been the habit of railroad companies to arrange, at the earliest practicable moment, to take one express company on some or all of their passenger trains, or to provide some other way of doing an express business on their lines, it has never been the practice to grant such a privilege to more than one company at the same time, unless a statute or some special circumstances made it necessary or desirable. The express companies that bring these suits are certainly in no situation to claim a usage in their favor on these particular roads, because their entry was originally under special contracts, and no other companies have ever been admitted except by agreement. By the terms of their contracts they agreed that all their contract rights on the roads should be terminated at the will of the railroad company. They were willing to begin and to expand their business upon this understanding, and with this uncertainty as to the duration of their privileges. The stoppage of their facilities was one of the risks they assumed when

they accepted their contracts, and made their investments under them. If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented. As it is, we have only to decide whether these particular express companies must be carried notwithstanding the termination of their special contract rights.

The difficulty in the cases is apparent from the form of the decrees. As express companies had always been carried by railroad companies under special contracts, which established the duty of the railroad company upon the one side, and fixed the liability of the express company on the other, the court, in decreeing the carriage was substantially compelled to make for the parties such a contract for the business as in its opinion they ought to have made for themselves. Having found that the railroad company should furnish the express company with facilities for business, it had to define what those facilities must be, and it did so by declaring that they should be furnished to the same extent and upon the same trains that the company accorded to itself or to any other company engaged in conducting an express business on its line. It then prescribed the time and manner of making the payment for the facilities and how the payment should be secured, as well as how it should be measured. Thus, by the decrees, these railroad companies are compelled to carry these express companies at these rates, and on these terms, so long as they ask to be carried, no matter what other express companies pay for the same facilities or what such facilities may, for the time being, be reasonably worth, unless the court sees fit, under the power reserved for that purpose, on the application of either of the parties, to change the measure of compensation. In this way as it seems to us, "the court has made an arrangement for the business intercourse of these companies, such as, in its opinion, they ought to have made for themselves," and that, we said in *Atchison, Topeka and Santa Fé Railroad Co.* v. *Denver & New Orleans Railroad Co.*, 110 U. S. 667, followed at this term in *Pullman's Palace Car Co.* v. *Missouri Pacific Railway Co.*, 115 U. S. 587, could not be done. The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the States, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt. The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts, but, unless a duty has been created either by usage or by contract, or by statute, the courts cannot be called on to give it effect.

The decree in each of the cases is reversed, and the suit is remanded, with directions to dissolve the injunction, and, after adjusting the accounts between the parties for business done while the injunctions were in force, and decreeing the payment of any amounts that may be found to be due, to dismiss the bills.

MR. JUSTICE MILLER dissenting.

When these cases were argued before Circuit Judge McCrary and myself at St. Louis, after due consideration and consultation with him and Judge Treat, of the District Court, I announced certain propositions as the foundations on which the decrees should be rendered. These were afterwards entered in the various circuits to which the cases properly belonged, and, I believe, in strict accordance with the principles thus announced.

I am still of opinion that those principles are sound, and I repeat them here as the reasons of my dissent from the judgment of the court now pronounced in these cases.

They met the approval of Judge McCrary when they were submitted to his consideration. They were filed in the court in the following language:

"1. I am of opinion that what is known as the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized.

"That, while it is not possible to give a definition in terms which will embrace all classes of articles usually so carried, and to define it with a precision of words of exclusion, the general character of the business is sufficiently known and recognized to require the court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads.

"That the object of this express business is to carry small and valuable packages rapidly, in such a manner as not to subject them to the danger of loss and damage, which, to a greater or less degree, attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise, and the like.

"2. It has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent or messenger of the person or company engaged in it, and to refuse permission to this agent to accompany these packages on steamboats or railroads on which they are carried, and to deny them the right to the control of them while so carried, is destructive of the business and of the rights which the public have to the use of the railroads in this class of transportation.

"3. I am of the opinion that when express matter is so confided to the charge of an agent or messenger, the railroad company is no longer liable to all the obligations of a common carrier, but that when loss or injury occurs, the liability depends upon the exercise of due care, skill, and diligence on the part of the railroad company.

"4. That, under these circumstances, there does not exist on the part of the railroad company the right to open and inspect all packages so carried, especially when they have been duly closed or sealed up by their owners or by the express carrier.

"5. I am of the opinion that it is the duty of every railroad com-

pany to provide such conveyance by special cars, or otherwise, attached to their freight and passenger trains, as are required for the safe and proper transportation of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business.

"If the number of persons claiming the right to engage in this business at the same time, on the same road, should become oppressive, other considerations might prevail; but until such a state of affairs is shown to be actually in existence in good faith, it is unnecessary to consider it.

"6. This express matter and the person in charge of it should be carried by the railroad company at fair and reasonable rates of compensation; and where the parties concerned cannot agree upon what that is, it is a question for the courts to decide.

"7. I am of the opinion that a court of equity, in a case properly made out, has the authority to compel the railroad companies to carry this express matter, and to perform the duties in that respect which I have already indicated, and to make such orders and decrees, and to enforce them by the ordinary methods in use necessary to that end.

"8. While I doubt the right of the court to fix in advance the precise rates which the express companies shall pay and the railroad company shall accept, I have no doubt of its right to compel the performance of the service by the railroad company, and after it is rendered to ascertain the reasonable compensation and compel its payment.

"9. To permit the railway company to fix upon a rate of compensation which is absolute, and insist upon the payment in advance or at the end of every train, would be to enable them to defeat the just rights of the express companies, to destroy their business, and would be a practical denial of justice.

"10. To avoid this difficulty, I think that the court can assume that the rates, or other mode of compensation heretofore existing between any such companies are *prima facie* reasonable and just, and can require the parties to conform to it as the business progresses, with the right to either party to keep and present an account of the business to the court at stated intervals, and claim an addition to, or rebate from, the amount paid. And to secure the railroad companies in any sum which may be thus found due them, a bond from the express company may be required in advance.

"11. When no such arrangement has heretofore been in existence it is competent for the court to devise some mode of compensation to be paid as the business progresses, with like power of final revision on evidence, reference to master, &c.

"12. I am of opinion that neither the statutes nor constitutions of Arkansas or Missouri were intended to affect the right asserted in these cases; nor do they present any obstacle to such decrees as may enforce the right of the express companies."

Three years' reflection and the renewed and able argument in this court have not changed my belief in the soundness of these principles.

That there may be slight errors in the details of the decrees of the Circuit Courts made to secure just compensation for the services of the railroad companies is possibly true, but I have not discovered them, and the attention of the court has not been given to them in deciding this case; for holding, as it does, that the complainants were entitled to no relief whatever, it became unnecessary to consider the details of the decrees.

I only desire to add one or two observations in regard to matters found in the opinion of this court.

1. The relief sought in these cases is not sought on the ground of usage in the sense that a long course of dealing with the public has established a custom in the nature of law. Usage is only relied on as showing that the business itself has forced its way into general recognition as one of such necessity to the public, and so distinct and marked in its character, that it is entitled to a consideration different from other modes of transportation.

2. It is said that the regulation of the duties of carrying by the railroads, and of the compensation they shall receive, is legislative in its character and not judicial.

As to the duties of the railroad company, if they are not, as common carriers, under legal obligation to carry express matter for any one engaged in that business in the manner appropriate and usual in such business, then there is no case for the relief sought in these bills. But if they are so bound to carry, then in the absence of any legislative rule fixing their compensation I maintain that that compensation is a judicial question.

It is, then, the ordinary and ever-recurring question on a *quantum meruit*. The railroad company renders the service which, by the law of its organization, it is bound to render. The express company refuses to pay for this the price which the railroad company demands, because it believes it to be exorbitant. That it is a judicial question to determine what shall be paid for the service rendered, in the absence of an express contract, seems to me beyond doubt.

That the legislature *may*, in proper case, fix the rule or rate of compensation, I do not deny. But until this is done the court must decide it, when it becomes matter of controversy.

The opinion of the court, while showing its growth and importance, places the entire express business of the country wholly at the mercy of the railroad companies, and suggests no means by which they can be compelled to do it. According to the principles there announced, no railroad company is bound to receive or carry an express messenger or his packages. If they choose to reject him or his packages, they can throw all the business of the country back to the crude condition in which it was a half-century ago, before Harnden established his local express between the large Atlantic cities; for, let it be remem-

bered that plaintiffs have never refused to pay the railroad companies reasonable compensation for their services, but those companies refuse to carry for them at any price or under any circumstances.

I am very sure such a proposition as this will not long be acquiesced in by the great commercial interests of the country and by the public, whom both railroad companies and the express men are intended to serve. If other courts should follow ours in this doctrine, the evils to ensue will call for other relief.

It is in view of amelioration of these great evils that, in dissenting here, I announce the principles which I earnestly believe *ought* to control the actions and the rights of these two great public services.

Mr. Justice Field dissenting.

I agree with Mr. Justice Miller in the positions he has stated, although in the cases just decided I think the decrees of the courts below require modification in several particulars; they go too far. But I am clear that railroad companies are bound, as common carriers, to accommodate the public in the transportation of goods according to its necessities, and through the instrumentalities or in the mode best adapted to promote its convenience. Among these instrumentalities express companies, by the mode in which their business is conducted, are the most important and useful.

Mr. Justice Matthews took no part in the decision of these cases.[1]

OLD COLONY RAILROAD *v.* TRIPP.

Supreme Judicial Court of Massachusetts, 1888.

[147 *Mass.* 35; 17 *N. E.* 89.]

W. Allen, J., delivered the opinion of the court.

Whatever implied license the defendant may have had to enter the plaintiff's close had been revoked by the regulations made by the plaintiff for the management of its business and the use of its property in its business. The defendant entered under a claim of right, and can justify his entry only by showing a right superior to that of the plaintiff. The plaintiff has all the rights of an owner in possession, except such as are inconsistent with the public use for which it holds its franchise; that is, with its duties as a common carrier of persons and merchandise. As concerns the case at bar, the plaintiff is obliged to be a common carrier of passengers; it is its duty to furnish reasonable facilities and accommodations for the use of all persons who seek for transportation over its road. It provided its depot for the use of persons who were transported on its cars to or from the sta-

[1] *Acc.* Pfister *v.* R. R., 70 Cal. 169; Louisville, &c. Ry. *v.* Keefer, 146 Ind. 21; 44 N. E. 796; Sargent *v.* R. R., 115 Mass. 416; Exp. Co. *v.* R. R., 111 N. C. 463; 16 S. E. 393. — Ed.

tion, and holds it for that use; and it has no right to exclude from it persons seeking access to it for the use for which it was intended and is maintained. It can subject the use to rules and regulations; but by statute, if not by common law, the regulations must be such as to secure reasonable and equal use of the premises to all having such right to use them. See Pub. Stat. chap. 112, § 188; Fitchburg Railroad *v.* Gage, 12 Gray, 393; Spofford *v.* Boston & Maine Railroad, 128 Mass. 326. The station was a passenger station. Passengers taking and leaving the cars at the station, and persons setting down passengers or delivering merchandise or baggage for transportation from the station, or taking up passengers or receiving merchandise that had been transported to the station, had a right to use the station buildings and grounds, superior to the right of the plaintiff to exclusive occupancy. All such persons had business with the plaintiff, which it was bound to attend to in the place and manner which it had provided for all who had like business with it.

The defendant was allowed to use the depot for any business that he had with the plaintiff. But he had no business to transact with the plaintiff. He had no merchandise or baggage to deliver to the plaintiff or to receive from it. His purpose was to use the depot as a place for soliciting contracts with incoming passengers for the transportation of their baggage. The railroad company may be under obligation to the passenger to see that he has reasonable facilities for procuring transportation for himself and his baggage from the station, where his transit ends. What conveniences shall be furnished to passengers within the station for that purpose is a matter wholly between them and the company. The defendant is a stranger both to the plaintiff and to its passengers, and can claim no rights against the plaintiff to the use of its station, either in his own right or in the right of passengers. The fact that he is willing to assume relations with any passenger, which will give him relations with the plaintiff involving the right to use the depot, does not establish such relations or such right; and the right of passengers to be solicited by drivers of hacks and job-wagons is not such as to give to all such drivers a right to occupy the platforms and depots of railroads. If such right exists, it exists, under the statute, equally for all; and railroad companies are obliged to admit to their depots, not only persons having business there to deliver or receive passengers or merchandise, but all persons seeking such business, and to furnish reasonable and equal facilities and conveniences for all such.

The only case we have seen which seems to lend any countenance to the position that a railroad company has no right to exclude persons from occupying its depots for the purpose of soliciting the patronage of passengers is Markham *v.* Brown, 8 N. H. 523, in which it was held that an innholder had no right to exclude from his inn a stagedriver who entered it to solicit guests to patronize his stage in opposition to a driver of a rival line who had been admitted

for a like purpose. It was said to rest upon the right of the passengers rather than that of the driver. However it may be with a guest at an inn, we do not think that passengers in a railroad depot have such possession of a right in the premises as will give to carriers of baggage, soliciting their patronage, an implied license to enter, irrevocable by the railroad company. Barney *v.* Oyster Bay H. Steamboat Co. 67 N. Y. 301, and Jencks *v.* Coleman, 2 Sumn. 221, are cases directly in point. See also Com. *v.* Power, 7 Met. 596, and Harris *v.* Stevens, 31 Vt. 79.

It is argued that the statute gave to the defendant the same right to enter upon and use the buildings and platforms of the plaintiff, which the plaintiff gave to Porter & Sons. The plaintiff made a contract with Porter & Sons to do all the service required by incoming passengers, in receiving from the plaintiff, and delivering in the town, baggage and merchandise brought by them; and prohibited the defendant and all other owners of job-wagons from entering the station for the purpose of soliciting from passengers the carriage of their baggage and merchandise, but allowed them to enter for the purpose of delivering baggage or merchandise, or of receiving any for which they had orders. Section 188 of the Pub. Stats. chap. 112, is in these words: "Every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents, and servants, and of any merchandise and other property, upon its railroad, and for the use of its depot and other buildings and grounds, and, at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange." A penalty is prescribed in § 191 for violations of the statute. The statute, in providing that a railroad corporation shall give to all persons equal facilities for the use of its depot, obviously means a use of right. It does not intend to prescribe who shall have the use of the depot, but to provide that all who have the right to use it shall be furnished by the railroad company with equal conveniences. The statute applies only to relations between railroads as common carriers, and their patrons. It does not enact that a license given by a railroad company to a stranger shall be a license to all the world. If a railroad company allows a person to sell refreshments or newspapers in its depots, or to cultivate flowers on its station-grounds, the statute does not extend the same right to all persons. If a railroad company, for the convenience of its passengers, allows a baggage expressman to travel in its cars to solicit the carriage of the baggage of passengers, or to keep a stand in its depot for receiving orders from passengers, the statute does not require it to furnish equal facilities and conveniences to all persons. The fact that the defendant, as the owner of a job-wagon, is a common carrier, gives him no special right under the statute; it only shows that it is possible for him to perform for passengers the service which he wishes to solicit of them.

The English Railway & Canal Traffic Act, 17 & 18 Vict. chap. 31, requires every railway and canal company to afford all reasonable facilities for traffic, and provides that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever." Marriott *v.* London & S. W. R. Co. 1 C. B. N. S. 499, was under this statute. The complaint was that the omnibus of Marriott, in which he brought passengers to the railroad, was excluded by the railway company from its station grounds, when other omnibuses, which brought passengers, were admitted. An injunction was ordered. Beadell *v.* Eastern Counties R. Co. 2 C. B. N. S. 509, was a complaint, under the statute, that the railway company refused to allow the complainant to ply for passengers at its station, it having granted the exclusive right of taking up passengers within the station, to one Clark. The respondent allowed the complainant's cabs to enter the station for the purpose of putting down passengers, and then required him to leave the yard. An injunction was refused. One ground on which the case was distinguished from Marriott's was that the complainant was allowed to enter the yard to set down passengers, and was only prohibited from remaining to ply for passengers. See also Painter *v.* London, B. & S. C. R. Co. 2 C. B. N. S. 702; Barker *v.* Midland R. Co. 18 C. B. 46. Besides Marriott's Case, *supra*, Palmer *v.* London, B. & S. C. R. Co. L. R. 6 C. P. 194, and Parkinson *v.* Great Western R. Co. L. R. 6 C. P. 554, are cases in which injunctions were granted under the statute: in the former case, for refusing to admit vans containing goods to the station-yard for delivery to the railway company for transportation by it; in the latter case, for refusing to deliver at the station, to a carrier authorized to receive them, goods which had been transported on the railroad.

We have not been referred to any decision or dictum, in England or in this country, that a common carrier of passengers and their baggage to and from a railroad station has any right, without the consent of the railroad company, to use the grounds, buildings, and platforms of the station for the purpose of soliciting the patronage of passengers; or that a regulation of the company which allows such use by particular persons, and denies it to others, violates any right of the latter. Cases at common law or under statutes to determine whether railroad companies in particular instances gave equal terms and facilities to different parties to whom they furnished transportation, and with whom they dealt as common carriers, have no bearing on the case at bar. The defendant, in his business of solicitor of the patronage of passengers, held no relations with the plaintiff as a common carrier, and had no right to use its station-grounds and buildings.

A majority of the court are of the opinion that there should be —

Judgment on the verdict.[1]

[1] *Acc.* Brown *v.* N. Y. C. & H. R. R. R., 27 N. Y. Sup. 69. — Ed.

FIELD, J.[1] The Chief Justice, Mr. Justice DEVENS, and myself think that our statutes should receive a different construction from that given to them by a majority of the court. . . .

The provision that every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the use of the depot and other buildings and grounds, must include the use of the depot and other buildings and grounds for receiving passengers and merchandise from a railroad at the terminus where the transportation on the railroad ends, as well as for delivering passengers and merchandise to a railroad at the terminus where such transportation begins. As the last clause of the section makes provision for carriers connecting by railroad, we think that the preceding clause was intended to make provision for other connecting carriers, and to include public or common carriers as well as private carriers actually employed by passengers or by the owners or consignees of merchandise. Stages and expresses are the only common carriers of passengers and of merchandise to and from many places in the Commonwealth, and, in connection with railroads, often form a continuous line of transportation. The statute, we think, was intended to prevent unjust discrimination by a railroad corporation between common carriers connected with it in any manner, and to require that the railroad corporation should furnish to such carriers reasonable and equal terms, facilities, and accommodations in the use of its depot and other buildings and grounds for the interchange of traffic.

A railroad corporation can make reasonable rules and regulations concerning the use of its depot and other buildings and grounds, and can exclude all persons therefrom who have no business with the railroad, and it can probably prohibit all persons from soliciting business for themselves on its premises. Whatever may be its right to exclude all common carriers of passengers or of merchandise from its depot and grounds, who have not an order to enter, given by persons who are, or who intend to become, passengers, or who own or are entitled to the possession of merchandise which has been or is to be transported, it cannot arbitrarily admit to its depot and grounds one common carrier and exclude all others. The effect of such a regulation would be to enable a railroad corporation largely to control the transportation of passengers and merchandise beyond its own line and to establish a monopoly not granted by its charter which might be solely for its own benefit and not for the benefit of the public. Such a regulation does not give "to all persons or companies reasonable and equal terms, facilities, and accommodations . . . for the use of its depot and other buildings and grounds," in the transportation of persons and property. See Parkinson *v.* Great Western R. Co., L. R. 6 C. P. 554; Palmer *v.* London, B. & S. C. R. Co. Id.

[1] Part of this opinion is omitted. — ED.

194; New England Express Co. *v.* Maine Central R. Co. 57 Me. 188. . . .

It is undoubtedly a convenience to passengers on a railroad, that common carriers of passengers, or of baggage and other merchandise, should be in waiting on the arrival of trains at a station, although no order requiring the attendance of such carriers has been previously given.

While the statute requiring a railroad corporation to give to all persons and companies reasonable and equal terms, facilities, and accommodations for the use of its depot and other buildings and grounds must, from the nature of the subject, be so construed as to permit the corporation to make such reasonable regulations as are necessary to enable it to perform, without inconvenience, its duties as a common carrier, and such as the size and condition of its depot and other buildings and grounds require, yet the facts stated in the report cannot be held sufficient to warrant the plaintiff in admitting one company of expressmen to, and in excluding all others from, the advantages of bringing express wagons within its grounds, and of accepting or of soliciting employment as a common carrier of baggage from the passengers arriving at its depot. The report does not show that any inconvenience to the railroad company, or to the public using the railroad, was occasioned by the defendant entering the grounds of the company for the purpose of soliciting employment as a common carrier of baggage. Upon the facts, as they appear in the report, it cannot be said that, within any reasonable construction of the statute, reasonable and equal facilities were granted to the defendant and to Porter & Sons; or that any necessity existed for giving a preference to the latter.

GRISWOLD *v.* WEBB.

SUPREME COURT OF RHODE ISLAND, 1889.

[16 *R. I.* 649: 19 *Atl.* 143.]

STINESS, J. The plaintiff is owner of Commercial Wharf, in Newport, a part of which is leased to the Newport & Wickford Railroad & Steam-Boat Company as a terminus. To preserve order upon the wharf, stands are let for hackney carriages, and the following rules are prescribed for its use: "Rules for Hackmen and Others. (1) Drivers of hackney carriages shall remain on or near their carriages, except when carrying baggage to or from them. (2) No one shall occupy a hack-stand or express-stand except the licensee or his employes. (3) No hackney carriage or express wagon shall stand on the space to the eastward of the restaurant building, or on the road-ways, except on licensed hack-stands, even though ordered in advance by a passenger." East of the restaurant building is a

plank walk for passengers, and east of the walk a space is reserved for private carriages. The rest of the wharf is used for sidewalks, road-ways, and buildings. The defendant, driver of a hackney carriage in Newport, went to the wharf, on the day in question, for a lady who was to arrive in the boat, as he had been ordered to do by the passenger, or some one in her behalf. He backed his hack as near as he could to the space reserved for private carriages, when he was ordered to leave the wharf by the superintendent, upon the ground that he had no right to be there, having no license from the owner. The plaintiff claimed that the wheels of the defendant's carriage were backed on to the plank walk, but, upon all the testimony, we are not satisfied this was so, or, if so, that it was anything more than accidental. At any rate, the order to leave the wharf was not put upon this ground, but because he had no right there. Upon receiving the order to leave, the defendant stated, both to the plaintiff and to the superintendent of the wharf, that he had been ordered there for a passenger, and he refused to leave. The plaintiff then called a policeman, who moved the carriage to another place in the road-way, where the defendant remained until the boat arrived, when he took his passenger and drove away. The passenger was an infirm lady, who had been accustomed to ride with the defendant, and one who was obliged to use a stool, which he had with him, to aid her in getting into the carriage. The plaintiff sues in trespass, and the defendant justifies under a right as servant of the passenger. The question is whether the defendant had the right to enter and remain upon the wharf to take the passenger, notwithstanding the rules and the order to leave. We understand the rules to forbid an unlicensed hackney carriage to stand upon the wharf at all; for none are allowed to stand in the road-ways, except on the licensed stands, and none are allowed to occupy a stand without a license. But the wharf is leased to a common carrier of passengers, with a provision that the space east of the restaurant shall be reserved for the use of private carriages of passengers arriving at the wharf.

The question of right, therefore, is the same as it would be between passengers and a company which owns its terminus. While such ownership carries with it a right of control, in most respects the same as in private property, a railroad station or steam-boat wharf is, to some extent, a public place. The public have the right to come and go there for the purpose of travel; for taking and leaving passengers; and for other matters growing out of the business of the company as a common carrier. But the company has the right to say that no business of any other character shall be carried on within the limits of its property. It has the right to say that no one shall come there to solicit trade, simply because it may be convenient for travellers, and so to say that none, except those whom it permits, shall solicit in the business of hacking or expressing. When notice of such prohibition has been given, the license which otherwise might be implied

is at an end, and it is the duty of persons engaged in any such business to heed the notice and to retire from the premises. Barney *v.* Steam-Boat Co., 67 N. Y. 301; Com. *v.* Power, 7 Met. 596.

But, while this is so, the company cannot deprive a passenger of the ordinary rights and privileges of a traveller, among which is the privilege of being transported from the terminus in a reasonably convenient and usual way. A company cannot compel a passenger to take one of certain carriages, or none at all; nor impose unreasonable restrictions, which will amount to that. If a passenger orders a carriage to take him from the terminus, such carriage is, *pro hac vice*, a private carriage; not in the sense that the passenger has a special property in it, so as to be liable for the driver's negligence, but in the sense that it is not "standing for hire." Masterson *v.* Short, 33 How. Pr. 481. The driver is not engaged in his vocation of soliciting patronage, but is waiting to take one with whom a contract has already been made. No question is made that a passenger may have his own carriage enter the premises of a carrier to take him away; but to say that one who is not so fortunate as to own a carriage shall not be allowed to call the one he wants, because it is a hackney carriage, would be a discrimination intolerable in this country. Yet this is really the plaintiff's claim. Every passenger has the right, upon the premises of the carrier, to reasonable and usual facilities for arrival and departure; and, so far as this includes the right to be taken to and from a station or wharf, it is immaterial whether he goes in a private or a hired carriage. Decisions upon this question have not been numerous, and we know of but one directly in point, although in others there are *dicta* which indicate what is understood to be the law. Summitt *v.* State, 8 Lea, 413, was a conviction of the defendant, a watchman in a depot, for assault in ejecting a hackman therefrom. The company had forbidden hackmen to enter the building. Notwithstanding this rule, the right of a hackman to go into a part of the depot to obtain the baggage of a passenger, whose check he had, was not controverted. The prosecutor, having the check of a passenger, was in another part of the depot; but it was held that the defendant was not justified in ejecting him altogether from the station, and the conviction was sustained. Tobin *v.* Railroad Co., 59 Me. 183, was an action for damages by a hackman who was injured by stepping on a defective platform when leaving a passenger at the station. The court say: "The hackman, conveying passengers to a railroad depot for transportation, and aiding them to alight upon the platform of the corporation, is as rightfully upon the same as the passengers alighting." In this case it was not claimed that any rules had been violated. The recent case of Railroad Co. *v.* Tripp, 147 Mass. 35, was an action of trespass against an expressman who solicited patronage in the plaintiff's station, contrary to its rules. W. ALLEN, J., says: "Passengers taking and leaving the cars at the station, and persons setting down passengers or delivering merchandise or bag-

gage for transportation from the station, or taking up passengers or receiving merchandise that had been transported to the station, had a right to use the station buildings and grounds, superior to the right of the plaintiff to exclusive occupancy. All such persons had business with the plaintiff, which it was bound to attend to in the place and manner which it had provided for all who had like business with it." A statute of Massachusetts prescribes that railroad corporations shall give to all persons equal facilities for the use of its depot. The court held that this statute applied only to the relations between common carriers and their patrons, or those who had the right to use the station. It did not give the defendant the right to go there to solicit business because another had the right. See, also, Harris *v.* Stevens, 31 Vt. 79. In Markham *v.* Brown, 8 N. H. 523, an action of trespass, brought by an innkeeper against a stage driver, the court say the defendant had clearly a right "to go to the plaintiff's inn with travellers, and he might of course lawfully enter it for the purpose of leaving their baggage and receiving his fare." The case most nearly in support of the plaintiff's contention of those we have seen is Barker *v.* Railroad Co., 18 C. B. 46, where it was held that an omnibus proprietor, carrying passengers to and from a station, could not maintain an action for a refusal to allow him to drive his vehicle into the station yard. As the proprietor was not using or seeking to use the railway, it was considered that the company owed him no duty. JERVIS, C. J., said a passenger would, no doubt, have a right of action, if unduly obstructed, but a violation of duty to him would not give an action to the plaintiff. It is to be observed that the recent English cases are mainly controlled by statute (17 & 18 Vict. c. 31), to which the Massachusetts statute is similar. They relate chiefly to the question whether a prohibition to one, to ply for passengers within a station, when the same right is granted to another, is an undue preference, under the statute. It is generally held that it is not. See In re Beadell, 2 C. B. (N. S.) 509; In re Painter, Id. 702; Hole *v.* Digby, 27 Wkly. Rep. 884. In the latter case it seems to be conceded that one going, *bona fide*, to meet a passenger, would not be guilty of trespass. In re Marriott, 1 C. B. (N. S.) 499, the defendant company was ordered to admit the complainant's omnibus into the station to receive and set down passengers and goods, as other public vehicles were admitted. Upon the question before us, we do not think these cases are in conflict with the views we have above expressed. The case at bar differs from Barker *v.* Railroad Co., *supra*, in this: that here the hackney driver is not plaintiff, seeking to recover damages for the revocation of a license to go upon the wharf, or for a breach of duty to another, but the defendant against an alleged trespass, who relied upon his right as servant of the other to justify his being there. We think the justification is sufficient. It is substantially given by the terms of the lease to the steam-boat company. This does not deprive the owner of the general

control of his wharf, nor interfere with his reasonable rules for its management. It simply secures to a passenger the common privilege of a passenger, and enables the hackney driver to shield himself from an apparent violation of the rules only when he is acting, *bona fide*, as the servant of such passenger. This qualification guards the owner from an incursion of unlicensed drivers under a mere pretense of serving passengers, and also confines the right of soliciting business on his premises to those whom he may permit. We give judgment for the defendant for his costs.

MONTANA UNION RY. *v.* LANGLOIS.

SUPREME COURT OF MONTANA, 1890.

[9 *Mont.* 419; 24 *Pac.* 209.]

HARWOOD, J.[1] The whole question involved in this controversy is compassed by the proposition, on the part of the plaintiff, "that it is the owner of said grounds, depot buildings, and platform, and that it may regulate the use of said platform as it desires, providing the travelling public is not inconvenienced; that it may, if it desires, engage in carrying passengers in hacks to and from its trains; that, if it was so engaged, it would have the right to its own property for such purpose; that, if it has such rights, it can as well employ Lovell Brothers with hacks to do such service as to own the hacks; that, if the plaintiff has the right to its platform, it has the right to sell that right to Lovells for a valuable consideration," and should be protected in the exercise and benefits of these rights. These propositions are controverted by defendants in so far as they affirm the right of the plaintiff to grant exclusive use of a portion of said platform to one party to approach and occupy the same, to convey passengers thereto, and receive passengers therefrom, and exclude all others from so doing. No complaint is made that any reasonable rule or regulation made by plaintiff for the government of its depot platform or grounds has beeu violated, or that defendants have committed any act which interferes with the transaction of plaintiff's business, except in so far as defendants interfere with the exclusive use of said portion of plaintiff's platform granted to Lovell Bros. In respect to the delivery of the United States mail matter at said platform, and transportation thereof to the United States post-office in the city of Butte, it is admitted that ample space for that purpose is left to the use of the company and its employes, according to its requirements. The question of handling the United States mail matter, it seems, is incidentally brought into this controversy; the transfer of this mail matter for the plaintiff being principally the consideration performed

[1] Part of the statement of facts contained in the opinion of the court is omitted. — ED.

by Lovell Bros. for the grant of exclusive use of the designated portions of the railway platform to them, at which place Lovell Bros. may ply for passengers to patronize their hacks and carriages.

If the plaintiff has the right to grant the exclusive use of its platform in the respect mentioned, it may be granted for any other valid consideration as well. It is not denied that a railway company may make and enforce all reasonable rules and regulations necessary to govern persons coming to its station buildings, platform, and grounds. It is highly proper and beneficial to all concerned that this be done. The law recognizes this right on the part of the common carrier, and the courts enforce it. Upon this point the learned counsel for appellant cites many authorities, with which this court agrees; but we conceive that the matter under consideration is a far different proposition. The grant of a special privilege to Lovell Bros. to use the specified portion of plaintiff's platform at said station, and the exclusion of all from approaching thereto, to land or receive passengers, is not a rule or regulation, in the common acceptation of these terms as used in the legal authorities, and applied to this subject. We therefore find in the numerous and valuable authorities cited on that theory only general aid in solving this controversy. A general rule or regulation, as applied to the government of the conduct of persons, or of a class of persons, contemplates uniformity, and not discrimination, in its requirements. This controversy must be solved by a consideration of the mutual rights of the appellant as a common carrier and its passengers. All passengers in common are entitled to equal opportunities and conveniences of place to approach and depart from plaintiff's trains. At the station mentioned the railway company either commences or terminates its engagement to transport its passengers to and from said station, as the case may be. The contract of the railway company does not require that it either furnish conveyance to bring the passenger to said platform, or transport him therefrom. The passenger may employ whom he desires to bring him there for the departure on plaintiff's trains, or to meet and receive him on his arrival at said station. But the plaintiff contends that it may grant the exclusive use of a large portion of its platform to one party, at which to land passengers for departure on said trains, or to receive passengers from said trains, and, if the passenger is willing to contract with this one party for transportation thereto or therefrom, such passenger may have the convenience of landing or departing from that portion of said platform; otherwise, he must land 50 feet away from said platform, or go to another portion of the platform, incumbered with express and baggage wagons and the handling of freight and baggage matter. Suppose a passenger travels every day from this station, and returns, he is entitled to the same convenience and facilities for approaching and leaving this depot as other passengers. If he contracts with another than Lovell Bros., or the party to whom the rail-

way company has granted the exclusive use of said portion of the platform to bring him there, and be there to receive him on his return, he must alight from his carriage, or be received by it 50 feet away from said platform, or be landed where the express and baggage matter is handled; while the passenger who employs Lovell Bros. for the same purpose may land at and depart from this convenient portion of said platform. Or if a party desired to use his own carriage to bring him to said station, or receive him on his return, it seems the same conditions would prevail.

Certainly, if the plaintiff has the right to grant the exclusive use of said platform to one, and exclude the public hackmen therefrom, it would apparently have the right to exclude the private hackmen therefrom. To the strong it would perhaps make no difference, as a matter of convenience, just where they were landed at or received from said station; but to the feeble and the helpless, and those incumbered with their care, it would be a matter of great discomfiture and inconvenience. Still other conditions which directly result from the position demanded by plaintiff, and which militate against the equal rights of passengers, may be suggested. Suppose all other hackmen who desire to compete with Lovell Bros. for the carrying passengers to and from this depot will perform the service for half the sum charged by Lovell Bros., are the passengers entitled to the benefit of this competition? Has not the passenger the right to call these other hackmen to his service, and, if he does call them, has he not a right to have such other hackmen approach the platform at the same place, or at least have an equal and common chance to approach at this same convenient place, as his co-passenger who employs Lovell Bros.? If any of the passengers do accept these better terms, they must suffer the discrimination of being denied a landing at that portion of the platform granted exclusively to Lovell Bros., or, when they alight from plaintiff's trains, they either go 50 feet away from that portion of said platform, or to the east side of the depot building, for transportation with a hackman at the less rate. It is a rule of universal application that the public is entitled to whatever competition may grow out of the public demands, on the one hand, and the contest of others to supply such demands, and receive the compensation therefor. Are not the conditions here sought to be so controlled by the plaintiff as to stifle the natural development of such competition? It is alleged by the plaintiff that by its arrangement with Lovell Bros. the latter engage to have a sufficient number of hacks and carriages, at the arrival of all passenger trains, to transport such passengers to the city of Butte from said station. But the plaintiff does not contract to carry its passengers destined to said station beyond that point, nor to see that such passengers are provided with transportation beyond that point. The plaintiff simply undertakes to reap a benefit from the necessity of its passengers, to procure on their own account, and from such party, and on such

terms as they may, transportation to the city. This benefit is sought to be derived by the plaintiff from a grant of the most favorable portion of the platform, where plaintiff sees fit to land its passengers, exclusively to one party to solicit their patronage, and, for this grant, such party aids plaintiff in carrying out its contract to deliver the United States mails at the post-office in the city of Butte. On principle we cannot reconcile these conditions which are demanded by appellant with the rule that all who come to take passage or who arrive at the station of a common carrier are entitled to equal convenience and opportunity to approach said station or depart therefrom. It seems to us that the direct effect of appellant's position is to say to its passengers, "You must employ Lovell Bros., or suffer certain inconveniences in taking passage with another."

These observations are not to be confounded with the question as to whether the railway company may not exclude all hackmen from its station buildings, or even from the platform, or set bounds on its grounds beyond which they should not come, as the exigencies of the situation and business might reasonably require, or to make and enforce any other reasonable rule as to the government of its depot buildings and grounds. It is not a general question of that character which here engages the consideration of the court. The constitution of this state (article 15, § 7) provides that "no discrimination in charges or facilities for transportation of freight or passengers of the same class shall be made by any railroad or transportation or express company between persons or places within the state."

The reported cases, involving like or similar facts as the one at bar, which have come to our attention, are few in number. The recent case of Railroad Co. *v.* Tripp, 147 Mass. 35, is the nearest in point. The facts involved in that case are quite similar to the case at bar, although it appears from the statement of facts and the opinion that while exclusive grant was made by the railroad company to Porter & Sons to come upon the depot premises to solicit passengers and baggage for transportation, and all other hackmen were forbidden to come there for that purpose, still all hackmen were allowed equal privileges to come to the station to deliver passengers and baggage, and to receive such as they had a previous order for. While we concur in the general principles of law applicable to common carriers announced by the majority of the nearly evenly divided court in that case we cannot subscribe to the conclusions drawn by the majority. On the contrary, after a careful consideration of that case, we are inclined to adopt the reasoning and conclusion of the dissenting opinion delivered by the three minority judges. The majority opinion in that case very clearly and forcibly states the general principles of law governing common carriers applicable to the present consideration. The court says: "The plaintiff is obliged to be a common carrier of passengers. It is its duty to furnish reasonable facilities and accommodations for the use of all persons who seek for transportation over its road. It provides its depot for the use of

persons who were transported on its cars, to or from the station, and holds it for that use; and it has no right to exclude from it persons seeking access to it for the use for which it was intended and is maintained. It can subject the use to rules and regulations; but by statute, if not by common law, the regulations must be such as secure reasonable and equal use of the premises to all having such right to use them." We do not find it consonant with reason, based upon those general propositions, to draw the conclusion that the railroad company may bring its passengers to a common landing, where the necessity, comfort, or convenience of their situation compels them to obtain on their own account transportation to some place beyond, and there introduce them to one favored party, saying: "If you engage transportation from this party, you may do so here on the spot, without delay or inconvenience, and take passage from this platform without delay or inconvenience, provided you will engage this particular party, and pay his demands; otherwise, you must suffer the importunity of this party to take passage with him, and if you will not, you must suffer the inconvenience and delay of going to some other point to engage conveyance and take passage." All this the railroad does, not for a benefit to the passengers, but for a benefit to itself, over and above what the passenger has paid for transportation over the railroad. If the railroad company set bounds beyond which all hackmen were forbidden to come, and undertook to forbid all solicitation within the depot or on the platform on the part of hackmen or others for employment, this would be an entirely different proposition. The company does not undertake to protect the passenger from that annoyance in these cases, but invites it, and farms out the exclusive privilege and opportunity to do this. In the case cited *supra*, the majority of the court bases its conclusion on the ground that the hackman has no right or license to be in plaintiff's depot without the express or tacit permission of plaintiff; and this license, if granted, may be revoked at pleasure. We may grant this premise. The right which the railroad has to exclude all hackmen from its depot buildings and platform may rest upon the same principle. But has the railroad company, in dealing with its passengers, and exercising a control over their movements and the conditions which surround them for the time being, a right to place one hackman in their midst, with exclusive control over the common conveniences and facilities of the place at which the passenger may land, or from which he may depart, so that, if the passenger obtain the use of these conveniences and facilities, he must purchase the privilege from such hackmen or suffer discrimination? The use of these common conveniences and facilities belong to the passengers alike, in the order in which they may come to occupy them; whereas the railroad company has granted away what belonged to the passengers in common, and the one holding the grant may use it as an advantage over the passenger, to compel his employment. It is said in the opinion cited *supra*: "If a railroad company allows a person to sell

refreshments or newspapers in its depots, or to cultivate flowers on its station grounds, the statute does not extend the same right to all persons." Upon this proposition it might be suggested that the passenger has no common interest or rights which meet and intermingle with the rights of the common carrier on this subject, or which are affected by such a grant. The same reply may be made, we think, with good reason, to the proposition as to a place to serve refreshments on the premises of the plaintiff. The passenger has no common rights which are taken away or interfered with by the company in this respect. It is true, the passenger's necessities may require that he have food at proper times on his journey; but all passengers have an equal right to provide supplies, under regulations which apply to all alike as to the amount of baggage allowed to each. Moreover, this question has no relation to the mutual engagements existing between the common carrier and its passengers. The passenger has purchased, or proposes to purchase, from the commou carrier, transportation, and he must come to the station to receive such transportation, and on arriving at his destination he must depart from the station. The right to come to the station, and depart therefrom, under reasonable regulations which apply alike to all passengers, without special conditions, is incidental to the main contract; while the supply of refreshments or newspapers, or the cultivation of flowers, at the station grounds, has, as we conceive, no appropriate connection with the engagements of the passenger and the common carrier.

The case cited *supra* is the only American case brought to our attention which passes upon points directly involved herein. The subject is apparently a new one in this country. The English cases involving the main subject of controversy are also few in number. In the case of Marriott *v.* Railway Co., 1 C. B. (N. S.) 499, the complainant, Marriott, alleged that he brought passengers to defendant's railway station, and the latter refused him access to the station grounds to deliver his passengers there, while at the same time this privilege was granted to other omnibuses; and, upon this showing, an injunction was granted. Other English cases bearing upon the main subject here under consideration have been examined. Beadell *v.* Railway Co., 2 C. B. (N. S.) 509; Painter *v.* Railway Co., Id. 702; Barker *v.* Railway Co., 18 C. B. 46. The demands in the case at bar on the part of plaintiff go beyond those urged in any of the cases so far examined by us.

Upon grounds of sound reason, public policy, and the general principles of law governing common carriers, as well as the provisions of the constitution, we believe the order of the court below ought to be affirmed; and it is so ordered.

BLAKE, C. J., concurs.[1]

[1] *Acc.* Indian River S. B. Co. *v.* East Coast Transp. Co., 28 Fla. 387, 10 So. 480; McConnell *v.* Pedigo, 92 Ky. 465, 18 S. W. 15; Kalamazoo Hack & Bus Co. *v.* Sootsma, 84 Mich. 194, 47 N. W. 667; Cravens *v.* Rodgers, 101 Mo. 247, 14 S. W. 106.

See Oregon Short Line & U. N. Ry. *v.* Ilwaco Ry. & Nav. Co., 51 Fed. 611. — ED.

STATE v. STEELE.

SUPREME COURT OF NORTH CAROLINA, 1890.

[106 *N. C.* 766; 11 *S. E.* 478.]

THIS was a criminal action, tried before CHARLES A. MOORE, Judge, and a jury, at the October term of the Criminal Court of Buncombe County, on an appeal from a court of a justice of the peace of said county.[1] . . .

The court charged the jury as follows: —

"If you shall find from the evidence that others engaged in the same business as the prosecutor were permitted by the defendant to go to the Battery Park Hotel for the same purpose for which the prosecutor went there, — that is, to secure and transact business for his employer's livery stable, — then the prosecutor had also the right to go there for that purpose at reasonable times, and to remain there a reasonable length of time for the transaction of such business; and it would not matter that the rules of the hotel forbade his entering the premises of the hotel for that purpose, or that he had been previously forbidden, in writing, to come upon the premises of the hotel, nor would it matter that the defendant had designated a place at the back of the hotel where livery-men could transact their livery business with the guests of the hotel, through the servants and employes of the hotel, even though the prosecutor knew of such place being so designated. He would not, however, have the right to go there at all times, nor would he have the right to remain there all the time, or an unreasonable length of time, for the transaction of such business, against the will of the owner or manager." . . .

AVERY, J. It was formerly held by the courts of England that where an innkeeper allured travellers to his tavern by holding himself out to the public as ready to entertain them, and then refused to receive them into his house when he had room to accommodate them, and after they had tendered the money to pay their bills, he was liable to indictment. But this doctrine, says Bishop (Volume I. § 532, Crim. Law), "has little practical effect at this time, being rather a relic of the past than a living thing of the present." Rex *v.* Luellin, 12 Mod. 445. In a *dictum* in State *v.* Matthews, 2 Dev. & B. 424, this old principle was stated with some qualification, viz., that "all and every one of the citizens have a right to demand entertainment of a public innkeeper, if they behave themselves, and are willing and able to pay for their fare; and, as all have a right to go there and be entertained, they are not to be annoyed there by disorder, and if the innkeeper permits it he is subject to be indicted as for a nuisance." Rommel *v.* Schanbacker, 120 Pa. 579. The duty and legal obligation resting upon the landlord is to admit only

[1] Part of the statement of facts is omitted. — ED.

such guests as demand accommodation, and he has the right to refuse to allow even travellers who are manifestly so filthy, drunken, or profane as to prove disagreeable to others who are inmates, and thereby to injure the reputation of his house, to enter his inn for food or shelter, though they may be abundantly able to pay his charges. 2 Whart. Crim. Law, § 1587; Reg. *v.* Rymer, 13 Cox, Crim. Cas. 378. The right to demand admission to the hotel is confined to persons who sustain the relation of guests, and does not extend to every individual who invades the premises, not in response to the invitation given by the keeper to the public, but in order to gratify his curiosity by seeing, or his cupidity by trading with, patrons who are under the protection of the proprietor. 1 Whart. Crim. Law, § 625. The landlord is not only under no obligation to admit, but he has the power to prohibit the entrance of, any person or class of persons into his house for the purpose of plying his guests with solicitations for patronage in their business; and especially is this true when the very nature of the business is such that human experience would lead us to expect the competing "drummers," in the heat of excitement, not only to trouble the guests by earnest and continued approaches, but by their noise, or even strife. The guest has a positive right to demand of the host such protection as will exempt him from annoyance by such persons as intrude upon him without invitation and without welcome, and subject him to torture by a display of their wares or books, or a recommendation of their nostrums or business. That learned and accomplished jurist, Chief Justice SHAW, delivering the opinion in Com. *v.* Power, 7 Met. 600, said: "An owner of a steamboat or railroad, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests, yet he is not only empowered, but he is bound, so to regulate his house as well with regard to the peace and comfort of his guests, who there seek repose, as to the peace and quiet of the vicinity, and to repress and prohibit all disorderly conduct therein, and of course he has a right and is bound to exclude from his premises all disorderly persons, and all persons not conforming to regulations necessary and proper to secure such quiet and good order." This principle was stated as an established one, and used by the court as an argument to sustain by analogy its ruling announced in a subsequent portion of the opinion, that a railroad company had a right by its regulations to exclude from its depot and cars, at any station, persons who visited them for the purpose of soliciting passengers to stop at particular hotels; and one of the reasons given for holding the regulation reasonable was that, where the agent urged the claims of their respective hotels "with earnestness and importunity, it was an annoyance to passengers." The doctrine is there laid down, too, that persons other than passengers *prima facie* have the right to enter the depot of a railroad company, as others besides guests may go into hotels, without making themselves trespassers, because in both instances there is an implied license given

to the public to enter. But such licenses in their nature are revocable, except in the one case as to passengers, and in the other as to guests, who have the right to enter the train, ticket-office, or hotel, as the case may be, if they are sober, orderly, and able to pay for transportation or fare. The court went further in that case, and held that, in enforcing the reasonable regulation against "drummers" for hotels at the depot, the servants of the railway company were not guilty of an assault for expelling by force, not excessive, a person who had repeatedly violated the regulation by going upon the platform and soliciting for a hotel, though on the particular occasion when he was ejected from it he had a ticket, and intended to take the train destined for another town, but failed to disclose to such servants the fact that he entered for "another purpose, when it was in his power to do so."

Were we to follow the analogy to which the principle laid down in that case would lead, an innkeeper could not only make and enforce a regulation forbidding persons to come on his premises for the purpose of soliciting his guests to patronize the livery stables that they might represent, but he might, in enforcing the rule against one who had previously violated it after notice that he should not do so, put such person off his premises, without excessive force, though at the particular time the person had entered with the *bona fide* intent to become a guest at the hotel, but failed to announce his purpose; or, under the same principle, he might expel by force one who becomes a guest, and takes advantage of his situation to subject other inmates of the house to the annoyance of "drumming" for such establishments. The same distinction is drawn between guests and others who enter an hotel intent on business or pleasure by the courts of Pennsylvania. In Com. *v.* Mitchell, 1 Phila. 63, and Com. *v.* Mitchel, 2 Pars. Eq. Cas. 431, it was held that an innkeeper is bound to receive and furnish food and lodging for all who enter his hotel as guests, and tender him a reasonable price for such accommodation; but "if an individual [other than a guest] has entered a public inn, and his presence is disagreeable to the proprietor or his guests, he has a right to request the person to depart, and, if he refuses, the innkeeper has the right to lay his hands gently upon him, and lead him out, and, if resistance is made, to employ sufficient force to put him out," without incurring liability to indictment "for assault and battery." . . .

[The learned judge here stated and commented upon the cases of Jencks *v.* Coleman, 2 Sum. 224; Barney *v.* Steam-Boat Co., 67 N. Y. 302; Harris *v.* Stevens, 31 Vt. 79; Old Colony R. R. *v.* Tripp, 147 Mass. 35.]

Upon a review of all the authorities accessible to us, and upon the application of well-established principles of law to the admitted facts of this particular case, we are constrained to conclude that there was error in the charge given by the court to the jury, because:

1. Guests of an hotel, and travellers or other persons entering it

with the *bona fide* intent of becoming guests, cannot be lawfully prevented from going in or put out by force, after entrance, provided they are able to pay the charges and tender the money necessary for that purpose, if requested by the landlord, unless they be persons of bad or suspicious character, or of vulgar habits, or so objectionable to the patrons of the house, on account of the race to which they belong, that it would injure the business to admit them to all portions of the house, or unless they attempt to take advantage of the freedom of the hotel to injure the landlord's chances of profit derived either from his inn or any other business incidental to or connected with its management, and constituting a part of the provision for the wants or pleasure of his patrons. Jencks *v.* Coleman, *supra;* Com. *v.* Mitchell, *supra;* Com. *v.* Power, *supra;* Pinkerton *v.* Woodward, 91 Amer. Dec. 660; Barney *v.* Steam-Boat Co., *supra;* 1 Whart. Crim. Law, § 621; Ang. Carr. §§ 525, 529, 530; Britton *v.* Railroad Co., 88 N. C. 536.

2. When persons unobjectionable on account of character or race enter an hotel, not as guests, but intent on pleasure or profit, to be derived from intercourse with its inmates, they are there, not of right, but under an implied license that the landlord may revoke at any time; because, barring the limitation imposed by holding out inducements to the public to seek accommodation at his inn, the proprietor occupies it as his dwelling-house, from which he may expel all who have not acquired rights, growing out of the relation of guest, and must drive out all who, by their bad conduct, create a nuisance and prove an annoyance to his patrons. Harris *v.* Stevens, 31 Vt. 79; 1 Whart. Crim. Law, § 625.

3. The regulation, if made by any innkeeper, that the proprietors of livery stables, and their agents or servants, shall not be allowed to enter his hotel for the purpose of soliciting patronage for their business from his guests, is a reasonable one, and, after notice to desist, a person violating it may be lawfully expelled from his house, if excessive force be not used in ejecting him. Com. *v.* Power, *supra;* Harris *v.* Stevens, *supra.* See, also, Griswold *v.* Webb, 16 R. I. 649; Railroad Co. *v.* Tripp, *supra.*

4. An innkeeper has unquestionably the right to establish a newsstand or a barber-shop in his hotel, and to exclude persons who come for the purpose of vending newspapers or books, or of soliciting employment as barbers; and, in order to render his business more lucrative, he may establish a laundry or a livery stable in connection with his hotel, or contract with the proprietor of a livery stable in the vicinity to secure for the latter, as far as he legitimately can, the patronage of his guests in that line for a per centum of the proceeds or profits derived by such owner of vehicles and horses from dealing with the patrons of the public house. After concluding such a contract, the innkeeper may make, and after personal notice to violators, enforce, a rule excluding from his hotel the agents and representa-

tives of other livery stables who enter to solicit the patronage of his guests; and where one has persisted in visiting the hotel for that purpose, after notice to desist, the proprietor may use sufficient force to expel him if he refuse to leave when requested, and may eject him, even though on a particular occasion he may have entered for a lawful purpose, if he does not disclose his true intent when requested to leave, or whatever may have been his purpose in entering, if he in fact has engaged in soliciting the patronage of the guests. Barney *v.* Steam-Boat Co., *supra;* Jencks *v.* Coleman, and Harris *v.* Stevens, *supra;* Ang. & A. Corp. § 530.

5. The broad rule laid down by Wharton (1 Crim. Law, § 625) is that "the proprietor of a public inn has a right to request a person who visits it, not as a guest or on business with a guest, to depart, and if he refuse the innkeeper has a right to lay his hands gently upon him, and lead him out, and, if resistance be made, to employ sufficient force to put him out; and for so doing he can justify his conduct on a prosecution for assault and battery." It will be observed that the author adopts in part the language already quoted from the courts of Pennsylvania.

6. If it be conceded that the prosecutor went into the hotel at the request of a guest, and for the purpose of conferring with the latter on business, still, in any view of the case, if, after entering, he engaged in "drumming" for his employer when he had been previously notified to desist in obedience to a regulation of the house, the defendant had a right to expel him if he did not use more force than was necessary; and if the prosecutor, having entered to see a guest, did not then solicit business from the patrons of the hotel, but had done so previously, the defendant, seeing him there, had a right to use sufficient force to eject him, unless he explained, when requested to leave, what his real intent was. Harris *v.* Stevens, and Com. *v.* Power, *supra.* The guest, by sending for a hackman, could not delegate to him the right to do an act for which even the guest himself might lawfully be put out of the hotel.

7. If we go further, and admit, for the sake of argument, that the principle declared in Markham *v.* Brown, 8 N. H. 530, and relied on to sustain the view of the court below, is not inconsistent with the law on the same subject, as we find it laid down by Wharton and other recognized authorities, still our case will be found to fall under the exception to the general rule stated in express terms in that case. The court said: "If one comes to injure his [the innkeeper's] house, or if his business operates directly as an injury, that may alter the case; but that has not been alleged here; and perhaps there may be cases in which he may have a right to exclude all but travellers and those who have been sent for by them. It is not necessary to settle that at this time." There was no evidence in Markham *v.* Brown that the proprietor of the hotel had any contract with another stage line, or would suffer pecuniary loss or injury, if the agent who was

expelled was successful in his solicitations; and it seems that Angell and others, who cite as authority that case, as well as Jencks *v.* Coleman and Barney *v.* Steam-Boat Co., reconcile them by drawing the distinction that in the latter cases, and in the hypothetical case of an innkeeper, put by Justice STORY, the person whose expulsion was justified was doing an injury to the proprietor, who had him removed, by diminishing his profits derived legitimately from a business used as an adjunct to that of common carrier or innkeeper. In using the language quoted above, Justice PARKER seems to have had in his mind, without referring to it, the opinion of Justice STORY, delivered in the circuit court but two years before (Jencks *v.* Coleman, *supra*).

8. The defendant, as manager of the hotel, could make a valid contract, for a valuable consideration, with Sevier, to give him the exclusive privilege of remaining in the house and soliciting patronage from the guests in any business that grew out of providing for the comfort or pleasure of the patrons of the house. The proprietors of the public house might legitimately share in the profits of any such incidental business, as furnishing carriages, buggies, or horses to the patrons, and for that purpose had as full right to close their house against one who attempted to injure the business in which they had such interest as the owner of a private house would have had, and this view of the case is consistent with the doctrine enunciated in Markham *v.* Brown. There was no evidence tending to show that Chambers had actual permission from the proprietors to approach the inmates of the hotel on the subject of patronizing him, nor that they had actual knowledge of the fact that he had continued his solicitations after receiving a similar notice to that sent to the prosecutor. The fact that he was overlooked or passively allowed to remain in the hotel (it may be under the impression on the part of the defendant that he had desisted from his objectionable practices) cannot, in any view of the law, work a forfeiture of the right to enforce a reasonable regulation, made to protect their legitimate business from injury. If, therefore, a permit on the part of the defendant to Chambers to "drum" gratuitously in the house would at once have opened his doors to all of the competitors of the latter (a proposition that we are not prepared to admit), the defendant did not, so far as the testimony discloses the facts, speak to him on the subject; and the soundness of the doctrine that, without interfering with the legal rights of the guests, the proprietor of a hotel is prohibited by the organic law from granting such exclusive privileges to any individual, as to the use or occupancy of his premises, as any other owner of land may extend, is not drawn in question. We therefore sustain the second and third assignments of error. His honor erred, for the reasons given, in instructing the jury that the guilt of the defendant depended upon the question whether he permitted Chambers or Sevier to solicit custom in the house. He had a lawful right to discriminate, for a consideration, in favor of Sevier, while it does not appear from the evidence

that he granted any exclusive privileges to Chambers. We hold that the regulation was such a one as an innkeeper had the power to make, and must not be understood as approving the idea that the sanction of the municipal authorities could impart validity to it, if it were not reasonable in itself, and within the powers which the law gives to proprietors of public houses in order that they may guard their own rights and protect their patrons from annoyance. For the reasons given the defendant is entitled to a new trial.[1]

HALE *v.* GRAND TRUNK RAILROAD.

SUPREME COURT OF VERMONT, 1888.

[60 *Vt.* 605; 15 *Atl.* 300.]

Ross, J.[2] By the agreed case, November 2, 1885, the defendant was operating a railway from Portland, Me., to Canada Line, and had a station at Berlin Falls, N. H. As such it was carrying the mail on its mail trains for the United States government, according to the laws of the United States, and pursuant to the conditions and regulations imposed by the post-office department, at a fixed compensation. The plaintiff, on that evening, in attempting to go to its mail train while stopping at the station at Berlin Falls, for the purpose of mailing some letters, in the exercise of due and proper care, fell from an unguarded and, as he claims, insufficiently lighted platform, leading from the station to the train, and was injured. By the regulations of the post-office department it was then the duty of postal clerks on trains carrying the mail to receive at the cars among other things, from the public, letters on which the postage had been prepaid, and then to sell stamps with which to prepay such postage. Sections 720, 762, Instructions to Railway Postal Clerks. Hence, as a part of the service which the defendant was performing for the government, and for which it was receiving compensation from the government, it was under a duty to furnish the public a reasonably safe passage to and from its mail trains, while stopping at its regular stations, for the purpose of purchasing stamps and mailing such letters. The plaintiff was a member of the public, and was attempting to pass over the platform provided by the defendant to the mail train, for the lawful purpose of mailing two letters. By accepting the carriage of the mail for the government, the defendant became under the duty to furnish him a reasonably safe passage to its mail train, for the purpose of mailing his letters. In attempting to pass over the platform to its mail train for this purpose the plaintiff was

[1] See Fluker *v.* Georgia R. R. & B. Co., 81 Ga. 461, 8 S. E. 529; Com. *v.* Power, 7 Met 596; Cole *v.* Rowen, 88 Mich. 219, 50 N. W. 138; Smith *v.* New York, L. E. & W. R. R. 149 Pa. 249, 24 Atl. 304. — ED.

[2] The opinion only is given; it sufficiently states the case. — ED.

neither a trespasser, intruder, nor loafer, but was there to transact business, which the defendant had undertaken to do with him, for a compensation received from the government; in fact was there, at the invitation of the defendant, to transact business which it had been hired to perform for and with him, by the government. The duty of the defendant to furnish the plaintiff a reasonably safe passage to its mail train to mail his letters was none the less binding or obligatory because the compensation received therefor came from the government rather than the plaintiff. A. holds a regular passenger ticket over a railroad. The duty of the company operating the road to carry him safely is none the less binding, nor are his legal rights, if injured, in the least abridged because the ticket was paid for by the money of B., rather than with his own money. The government derives a large part of its revenue with which it pays for the mail service by the sale of postage stamps to whomsoever of the public may desire to use that arm of its service. The money which the plaintiff had paid for the postage stamps upon the letters he was carrying, or which he would have paid the postal clerk for stamps to use upon the letters, was indirectly a payment to the defendant for the service which it was about to perform for the plaintiff, in carrying the letters which he was about to post, on the way towards their destination. But whether the plaintiff paid indirectly to the defendant for the service and accommodations which it was under a duty to furnish him, or the government paid therefor, and gave it to the plaintiff, does not vary the defendant's duty to furnish him a reasonably safe passage to the mail car for the purpose of mailing his letters, nor are his legal rights thereby abated. Actionable negligence is a failure in legal duty which occasions an injury to a party free from contributory negligence, or who has not failed in the discharge of his duty in the given circumstances. They have also conceded in the agreed case that the plaintiff exercised due and proper care on the occasion. They only contend that the defendant was under no legal duty to furnish the plaintiff a reasonably safe passage to the mail car, for the purpose of mailing his letters, mainly because he was to pay the defendant nothing therefor directly. But, as we have already endeavored to show, that fact would not relieve the defendant from the duty, inasmuch as it was paid by the government for discharging that duty to the public; that is, to any person who had occasion to go to the mail car when stopping at regular stations to transact any lawful business with the servants of the government. These views would affirm the judgment of the county court, but, in accordance with the stipulation of the parties, that judgment is reversed *pro forma*, with costs to the plaintiff, and the cause remanded for trial.[1]

[1] See Bradford *v.* Boston & M. R. R., 160 Mass. 392, 35 N. E. 1131. — Ed.

LOUISVILLE & N. R. R. v. CRUNK.

SUPREME COURT OF INDIANA, 1889.

[119 *Ind.* 542; 21 N. E. 31.]

OLDS, J.[1] The first cause for new trial assigned was the giving by the court, at the request of the plaintiff, instructions 1, 2, 3, and 5. We set out some of the instructions. No. 1 is as follows: "If you believe from the evidence that at the time mentioned in the complaint the defendant, for hire, agreed to receive, and did receive, on board its train of cars at its passenger station at Mt. Vernon, Ind., one George Naas as a passenger, and that the defendant had knowledge that said Naas was at the time so sick and feeble as to render it necessary for him to be carried into defendant's car, and the conductor of said train then present had knowledge or had reasonable grounds to believe that the plaintiff entered said car as an assistant in carrying said Naas therein, and in seating said Naas in said car, then you may find that the plaintiff rightfully entered said car, and that the defendant owed the plaintiff the same duties, while he was rendering said assistance to said Naas, and while he was leaving said car, that it would owe to any of its passengers for hire." This instruction was proper. The defendant, in contracting to carry the passenger, Naas, in his sick and enfeebled condition, contracted an obligation which could only be carried out by Naas being carried upon the train and seated in the car. By thus contracting to carry Naas as a passenger it took upon itself the obligation of allowing him assistants to place him upon the train, and seat him in the car, and the compensation received by the defendant for conveying Naas from Mt. Vernon to his destination included as well the right to have assistants place him in the car as the carrying him after being so placed in the car, and the defendant owed the same obligation to his assistants while necessarily entering and leaving the car with Naas as it owed to Naas himself.[2]

SEARS *v.* EASTERN RAILROAD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1867.

[14 *Allen*, 433.]

ACTION containing one count in contract and one in tort. Each count alleged that the defendants were common carriers of passengers

[1] Only so much of the opinion as deals with the refusal to give instruction 1 is reprinted. — ED.

[2] See Ry. *v.* Lawton, 55 Ark. 428, 18 S. W. 543; Coleman *v.* Georgia R. R. & B. Co, 84 Ga. 1, 10 S. E. 498; Doss *v.* M. K. & T. R. R., 59 Mo. 27; Whitley *v.* Southern Ry. (N. C.), 29 S. E. 783. — ED.

between Boston and Lynn, and that on the 15th of September, 1865, the plaintiff was a resident of Nahant, near Lynn, and the defendants before then publicly undertook and contracted with the public to run a train for the carriage of passengers from Boston to Lynn at nine and one half o'clock in the evening each week day, Wednesdays and Saturdays excepted; and the plaintiff, relying on said contract and undertaking, purchased of the defendants a ticket entitling him to carriage upon their cars between Boston and Lynn, and paid therefor twenty-five cents or thereabouts, and on a certain week day thereafter, neither Wednesday nor Saturday, namely, on the 15th of said September, presented himself on or before the hour of nine and a half o'clock in the evening at the defendant's station in Boston and offered and attempted to take the train undertaken to be run at that hour, as a passenger, but the defendants negligently and wilfully omitted to run the said train at that hour, or any train for Lynn, till several hours thereafter; wherefore the plaintiff was compelled to hire a livery carriage and to ride therein to Lynn by night, and was much disturbed and inconvenienced.

The following facts were agreed in the Superior Court. The defendants were common carriers, as alleged, and inserted in the Boston Daily Advertiser, Post, and Courier, from the 15th day of August till the 15th day of September an advertisement announcing the hours at which trains would leave Boston for various places, and among others that a train would leave for Lynn at 9.30 P. M., except Wednesdays, when it would leave at 11.15, and Saturdays, when it would leave at 10.30.

The plaintiff, a resident of Nahant, consulted one of the above papers, about the 9th of September, 1865, for the purpose of ascertaining the time when the latest night train would start from Boston for Lynn on the 15th, in order to take the train on that day, and saw the advertisement referred to. On the 15th, which was on Friday, he came to Boston from Lynn in a forenoon train, and in the evening, shortly after nine o'clock, presented himself at the defendants' station in Boston for the purpose of taking the 9.30 train for Lynn, having with him a ticket which previously to September 9th he had purchased in a package of five. This ticket specified no particular train, but purported to be good for one passage in the cars between Boston and Lynn during the year 1865. He learned that this train had been postponed to 11.15, on account of an exhibition, and thereupon hired a buggy and drove to Lynn, arriving there soon after 10.30. He had seen no notice of any postponement of this train. He once, in 1864, observed a notice of postponement, and heard that the defendants sometimes postponed their late trains.

For several years before 1865 the defendants' superintendent had been accustomed occasionally to postpone this train, as often as from once to three times a month, for the purpose of allowing the public to attend places of amusement and instruction, and also upon holidays and other public occasions in Boston; giving notice thereof by hand-

bills posted in the defendants' cars and stations. On the 13th of September, 1865, in pursuance of this custom, he decided to postpone this train for September 15th till 11.15, and on the same day caused notice thereof to be printed and posted in the usual manner. The train was so postponed, and left Boston at 11.15, arriving at Lynn at 11.45.

The defendants offered to prove, if competent, that this usage of detaining the train was generally known to the people using the Eastern Railroad, and that the number of persons generally going by the postponed train was larger than generally went by the 9.30 train, and was larger on the evening in question; but at the station in Boston there were persons complaining of the postponement of the train, and leaving the station.

It was agreed that, if on these facts the plaintiff was entitled to recover, judgment should be entered in his favor for ten dollars, without costs. Judgment was rendered for the defendants, and the plaintiff appealed to this court.

J. L. Stackpole, for the plaintiff.

C. P. Judd, for the defendants. If the plaintiff can maintain any action, it must be upon the count in contract. There was no proof of deceit. Tryon *v.* Whitmarsh, 1 Met. 1. What then was the nature of the contract between the parties? The ticket merely secured one passage at any time in 1865. This was a contract to carry the plaintiff in the usual way of transporting passengers. It was usual to postpone this train, in order to give the public greater accommodations. The plaintiff was bound by this usage, whether he knew it or not. If he neglected to inquire as to the custom, it is his own fault. Van Santvoord *v.* St. John, 6 Hill, 160; Cheney *v.* Boston & Maine Railroad, 11 Met. 121; Clark *v.* Baker, Ib. 186; City Bank *v.* Cutter, 3 Pick. 414; Onimit *v.* Henshaw, 35 Vt. 616, 622. If the advertisement was an offer to carry passengers at 9.30, this offer was withdrawn on the 13th by due notice. M'Culloch *v.* Eagle Ins. Co., 1 Pick. 278; Boston & Maine Railroad *v.* Bartlett, 3 Cush. 227. The acquiescence in the usage of the defendants by the public for years shows that the notice was sufficient. The plaintiff should have made further inquiry. Booth *v.* Barnum, 9 Conn. 290; Taylor *v.* Stibbert, 2 Ves. Jr. 437; Taylor *v.* Baker, 5 Price, 306.

CHAPMAN, J. If this action can be maintained, it must be for the breach of the contract which the defendants made with the plaintiff. He had purchased a package of tickets entitling him to a passage in their cars for each ticket from Boston to Lynn. This constituted a contract between the parties. Cheney *v.* Boston & Fall River Railroad, 11 Met. 121; Boston & Lowell Railroad *v.* Proctor, 1 Allen, 267; Najac *v.* Boston & Lowell Railroad, 7 Allen, 329. The principal question in this case is, what are the terms of the contract? The ticket does not express all of them. A public advertisement of the times when their trains run enters into the contract, and forms a part of it. Denton *v.* Great Northern Railway, 5 El. & Bl. 860. It is an offer which, when

once publicly made, becomes binding, if accepted before it is retracted. Boston & Maine Railroad *v.* Bartlett, 3 Cush. 227. Advertisements offering rewards are illustrations of this method of making contracts. But it would be unreasonable to hold that advertisements as to the time of running trains, when once made, are irrevocable. Railroad corporations find it necessary to vary the time of running their trains, and they have a right, under reasonable limitations, to make this variation, even as against those who have purchased tickets. This reserved right enters into the contract, and forms a part of it. The defendants had such a right in this case.

But if the time is varied, and the train fails to go at the appointed time, for the mere convenience of the company or a portion of their expected passengers, a person who presents himself at the advertised hour, and demands a passage, is not bound by the change unless he has had reasonable notice of it. The defendants acted upon this view of their duty, and gave certain notices. Their trains had been advertised to go from Boston to Lynn at 9.30 P. M., and the plaintiff presented himself, with his ticket, at the station to take the train; but was there informed that it was postponed to 11.15. The postponement had been made for the accommodation of passengers who desired to remain in Boston to attend places of amusement. Certain notices of the change had been given; but none of them had reached the plaintiff. They were printed handbills posted up in the cars and stations on the day of the change, and also a day or two before. Though he rode in one of the morning cars from Lynn to Boston, he did not see the notice, and no legal presumption of notice to him arises from the fact of its being posted up. Brown *v.* Eastern Railroad, 11 Cush. 101; Malone *v.* Boston & Worcester Railroad, 12 Gray, 388. The defendants published daily advertisements of their regular trains in the Boston Daily Advertiser, Post, and Courier, and the plaintiff had obtained his information as to the time of running from one of these papers. If they had published a notice of the change in these papers, we think he would have been bound by it. For as they had a right to make changes, he would be bound to take reasonable pains to inform himself whether or not a change was made. So if in their advertisement they had reserved the right to make occasional changes in the time of running a particular train, he would have been bound by the reservation. It would have bound all passengers who obtained their knowledge of the time-tables from either of these sources. But it would be contrary to the elementary law of contracts to hold that persons who relied upon the advertisements in either of those papers should be bound by a reservation of the offer, which was, without their knowledge, posted up in the cars and stations. If the defendants wished to free themselves from their obligations to the whole public to run a train as advertised, they should publish notice of the change as extensively as they published notice of the regular trains. And as to the plaintiff, he was not bound by a notice published in the cars and stations which he did not see. If it

had been published in the newspapers above mentioned, where his information had in fact been obtained, and he had neglected to look for it, the fault would have been his own.

The evidence as to the former usage of the defendants to make occasional changes was immaterial, because the advertisement was an express stipulation which superseded all customs that were inconsistent with it. An express contract cannot be controlled or varied by usage. Ware *v.* Hayward Rubber Co., 3 Allen, 84.

The court are of opinion that the defendants, by failing to give such notice of the change made by them in the time of running their train on the evening referred to as the plaintiff was entitled to receive, violated their contract with him, and are liable in this action.

Judgment for the plaintiff.[1]

Section II. Compensation.

BASTARD *v.* BASTARD.

King's Bench, 1679.

[2 *Shower*, 81.]

Case against the defendant as a common carrier, for a box delivered to him to be carried to B., and lost by negligence.

Williams moved in arrest of judgment, because there was no particular sum mentioned to be paid or promised for hire, but only *pro mercede rationabili*.

Resolved well enough, and judgment given for the plaintiff; for perhaps there was no particular agreement, and then the carrier might have a *quantum meruit* for his hire, and he is therefore chargeable for the loss of the goods in the one case as the other.

FITCHBURG RAILROAD *v.* GAGE.

Supreme Judicial Court of Massachusetts, 1859.

[12 *Gray*, 393.]

Action of contract upon an account annexed against Gage, Hittinger, & Company for the transportation of ice from Fresh and Spy Ponds to Charlestown, over that portion of the plaintiff's railroad which was formerly the Charlestown Branch Railroad, and from Groton to Charlestown over that portion which has always been known as the Fitchburg Railroad. The case was referred to an auditor, to whose

[1] See Denton *v.* Great Northern Ry., 5 E. & B. 860. — Ed.

report the defendants took exceptions presenting pure questions of law, and was thereupon reserved by *Bigelow*, J., for the consideration of the whole court, and is stated in the opinion.

S. Bartlett & D. Thaxter, for the defendants.

R. Choate & H. C. Hutchins, for the plaintiffs.

Merrick, J. This action is brought to recover the balance of the account annexed to the writ. The defendants admit the transportation for them of all the ice charged to them in the account, and that the several items contained in it relative to the service performed for them are correct. But they insist that the rate of compensation claimed is too large, and that the charges ought to be reduced. They have also filed an account in set-off, claiming to recover back the amount of an alleged overpayment made by them for similar services in the transportation of other quantities of ice belonging to them.

Their claim to be entitled to a diminution in the amount of charges in the plaintiffs' account, and to a recovery of the sum stated in their account in set-off, both rest upon the same ground. They contended and offered to prove at the hearing before the auditor, that while the plaintiffs were transporting the ice they were at the same time hauling over the same portion of their road various quantities of bricks for other parties; that ice and bricks were of the same class of freight, and that ice was as low a class of freight as bricks in regard to the risk and hazard of transportation; and that while they charged the defendants fifty cents per ton for the transportation of ice, they charged other parties only twenty cents per ton for a like service in reference to bricks.

The defendants contended that they were entitled to maintain their claim upon two grounds: first, under the provisions in the plaintiffs' act of incorporation; and, secondly, upon the general principle that as common carriers they were bound and required to transport every species of freight of the same class for any and all parties at the same rate of compensation; and that they had therefore no right to charge any greater sum for the transportation of ice than that for which they had actually carried bricks for other parties. Neither of the claims was sustained by the auditor, and he accordingly rejected the evidence offered in support of them. In both particulars we think his ruling was correct.[1]

It is contended on behalf of the defendants that the plaintiffs were common carriers; and that by the principles of the common law they are in that relation required to carry merchandise and other goods or chattels of the same class at equal rates for the public and for each individual on whose account service in this line of business is performed. There is no doubt they are common carriers. That is fully established. Thomas *v.* Boston & Providence Railroad, 10 Met. 472. Norway Plains Co. *v.* Boston & Maine Railroad, 1 Gray, 263. But by the law of this Commonwealth every railroad corporation is authorized to establish for their sole benefit a toll upon all passengers and property conveyed or transported on their railroad, at such rates as may be de-

[1] The decision upon the first ground is omitted. — Ed.

termined by the directors. Rev. Sts. c. 39, § 83. This right however is very fully, and reasonably, subjected to legislative supervision and control; a provision which may be believed to be sufficient to guard this large conceded power against all injustice or abuse. And in view of this large and unqualified, and therefore adequate supervision, the right of railroad corporations to exact compensation for services rendered may be considered as conforming substantially to the rule of the common law upon the same subject. This rule is clearly stated by Lawrence, J., in the case of Harris *v.* Packwood, 3 Taunt. 272: "I would not, however, have it understood that carriers are at liberty by law to charge whatever they please; a carrier is liable by law to carry everything which is brought to him, for a reasonable sum to be paid to him for the same carriage; and not to extort what he will." This is the doctrine of the common law. 2 Kent Com. (6th ed.) 599. Angell on Carriers, § 124. And it supplies substantially the same rule which is recognized and established in this Commonwealth by the provisions of St. 1845, c. 191. The recent English cases, cited by the counsel for the defendants, are chiefly commentaries upon the special legislation of Parliament regulating the transportation of freight on railroads constructed under the authority of the government there; and consequently throw very little light upon questions concerning the general rights and duties of common carriers, and are for that reason not to be regarded as authoritative expositions of the common law upon those subjects. The principle derived from that source is very plain and simple. It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge, in each particular case of service, a reasonable compensation, and no more. If the carrier confines himself to this, no wrong can be done, and no cause afforded for complaint. If, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals for a certain time or in certain quantities for less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief. It could of course make no difference whether such a concession was in relation to articles of the same kind or belonging to the same general class as to risk and cost of transportation. The defendants do not deny that the charge made on them for the transportation of their ice was according to the rates established by the directors of the company, or assert that the compensation claimed is in any degree excessive or unreasonable. Certainly then the charges of the plaintiffs should be considered legal as well as just; nor can the defendants have any real or equitable right to insist upon any abatement or deduction, because for special reasons, which are not known and cannot therefore be appreciated, allowances may have been conceded in particular instances, or in reference to a particular series of services, to other parties.

There remains another question, the determination of which depends upon other and different considerations. The auditor, for the purpose of presenting the question to the determination of the court, rejected evidence offered by the defendants tending to prove that prior to the 22d of February, 1855, and down to that time, the plaintiffs had transported for them large quantities of ice from Groton at a much less rate of compensation than the amount charged in their account under date of the 31st January of that year, without having given them notice, and without their knowledge, of any intention to increase the charge for such service. This evidence was rejected, for the reason that the directors of the plaintiff corporation had, prior to the transportation of the ice in the last named item, fixed and raised the rate of transportation of ice on their road from Groton to ninety cents per ton. This evidence ought to have been received. In the absence of any special contract between the parties, it had a tendency to show what was the understanding between the parties on the subject, and what the defendants had a right to consider would be the price to be charged to them for services performed in their behalf. If not controlled, it would and ought to have had a material effect upon determining the question concerning the compensation which the plaintiffs were entitled to recover. It might have been controlled either by showing that the defendants did in fact have notice of the new rate of charge established by the directors of the company, or that the notice was communicated generally to all persons, in the usual and ordinary manner, and with such degree of publicity that all persons dealing with them might fairly be presumed to have cognizance of the change.

In this particular therefore the exception to the ruling of the auditor must be sustained; in all others, the exceptions taken to his decisions are overruled.

The case must therefore be recommitted to the auditor for the purpose of hearing the evidence rejected, and any other proofs which the parties may respectively produce relative to the items of charge under date of January 31st, and finding the amount which is due for the services there stated; but for no other purpose whatever.

Exceptions sustained.

MESSENGER *v.* PENNSYLVANIA RAILROAD COMPANY.

Supreme Court of New Jersey, 1873.
Court of Errors and Appeals of New Jersey, 1874.

[7 *Vroom* (36 N. J. L.), 407, 8 *Vroom* (37 N. J. L.), 531.]

Beasley, C. J. The Pennsylvania Railroad Company, who are the defendants in this action, agreed with the plaintiffs to carry certain merchandise for them, between certain termini, at a fixed rate less than they should carry between the same points for any other person. The allegation is, that goods have been carried for other parties at a certain

rate below what the goods of the plaintiffs have been carried, and this suit is to enforce the foregoing stipulation. The question is, whether the agreement thus forming the foundation of the suit is legal.

There can be no doubt that an agreement of this kind is calculated to give an important advantage to one dealer over other dealers, and it is equally clear that, if the power to make the present engagement exists, many branches of business are at the mercy of these companies. A merchant who can transport his wares to market at a less cost than his rivals, will soon acquire, by underselling them, a practical monopoly of the business; and it is obvious, that this result can often be brought about if the rule is, as the plaintiffs contend that it is, that these bargains giving preferences can be made. A railroad is not, in general, subject to much competition in the business between its termini; the difficulty in getting a charter, and the immense expense in building and equipping a road, leaves it, in the main, without a rival in the field of its operation; and the consequence is, the trader who can transmit his merchandise over it on terms more favorable than others can obtain is in a fair way of ruling the market. The tendency of such compacts is adverse to the public welfare, which is materially dependent on commercial competition and the absence of monopolies. Consequently, the inquiry is of moment, whether such compacts may be made. I have examined the cases, and none that I have seen is, in all respects, in point, so that the problem is to be solved by a recurrence to the general principles of the law.

The defendants are common carriers, and it is contended that bailees of that character cannot give a preference in the exercise of their calling to one dealer over another. It cannot be denied, that at the common law, every person, under identical conditions, had an equal right to the services of their commercial agents. It was one of the primary obligations of the common carrier to receive and carry all goods offered for transportation, upon receiving a reasonable hire. If he refused the offer of such goods, he was liable to an action, unless he could show a reasonable ground for his refusal. Thus, in the very foundation and substance of the business, there was inherent a rule which excluded a preference of one consignor of goods over another. The duty to receive and carry was due to every member of the community, and in an equal measure to each. Nothing can be clearer than that, under the prevalence of this principle, a common carrier could not agree to carry one man's goods in preference to those of another.

It is important to remark, that this obligation of this class of bailees is always said to arise out of the character of the business. Sir William Jones, importing the expression from the older reports, declares that this, as well as the other peculiar responsibilities of the common carrier, is founded in the consideration that the calling is a public employment. Indeed, the compulsion to serve all that apply could be justified in no other way, as the right to accept or reject an offer of business is necessarily incident to all private traffic.

Recognizing this as the settled doctrine, I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons for an identical kind of service, under identical conditions. Such partiality is legitimate in private business, but how can it square with the obligations of a public employment? A person having a public duty to discharge, is undoubtedly bound to exercise such office for the equal benefit of all, and therefore to permit the common carrier to charge various prices, according to the person with whom he deals, for the same services, is to forget that he owes a duty to the community. If he exacts different rates for the carriage of goods of the same kind, between the same points, he violates, as plainly, though it may be not in the same degree, the principle of public policy which, in his own despite, converts his business into a public employment. The law that forbids him to make any discrimination in favor of the goods of A over the goods of B, when the goods of both are tendered for carriage, must, it seems to me, necessarily forbid any discrimination with respect to the rate of pay for the carriage. I can see no reason why, under legal rules, perfect equality to all persons should be exacted in the dealings of the common carrier, except with regard to the amount of compensation for his services. The rules that the carrier shall receive all the goods tendered loses half its value, as a politic regulation, if the cost of transportation can be graduated by special agreement so as to favor one party at the expense of others. Nor would this defect in the law, if it existed, be remedied by the principle which compels the carrier to take a reasonable hire for his labor, because, if the rate charged by him to one person might be deemed reasonable, by charging a lesser price to another for similar services, he disturbs that equality of rights among his employers which it is the endeavor of the law to effect. Indeed, when a charge is made to one person, and a lesser charge, for precisely the same offices, to another, I think it should be held that the higher charge is not reasonable; a presumption which would cut up by the roots the present agreement, as, by the operation of this rule, it would be a promise founded on the supposition that some other person is to be charged more than the law warrants.

From these considerations, it seems to me, that testing the duties of this class of bailees by the standard of the ancient principles of the law, the agreement now under examination cannot be sanctioned. This is the sense in which Mr. Smith understands the common law rule. In his Leading Cases, p. 174, speaking of the liabilities of carriers, he says: "The hire charged must be no more than a reasonable remuneration to the carrier, and, consequently, not more to one (though a rival carrier) than to another, for the same service." I am aware that in the case of Baxendale *v.* The Eastern Counties Railway, 4 C. B. (N. S.) 81, this definition of the common law rule was criticised by one of the judges, but the subject was not important in that case, and was not discussed, and the expression of opinion with respect to it was entirely cursory. Indeed, the whole question has become of no moment in the

English law, as the subject is specifically regulated by the statute 17 and 18 Vict., ch. 31, which prohibits the giving "of any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever." The date of this act is 1854, and since that time the decisions of the courts of Westminster have, when discussing this class of the responsibilities of common carriers, been devoted to its exposition. But the courts of Pennsylvania have repeatedly declared that this act was but declaratory of the doctrine of the common law. This was so held in the case of Sandford *v.* The Catawissa, Williamsport, & Erie Railroad Co., 24 Penn. 378, in which an agreement by a railway company to give an express company the exclusive right to carry goods in certain trains was pronounced to be illegal. In a more recent decision, Mr. Justice Strong refers to this case with approval, and says that the special provisions which are sometimes inserted in railroad charters, in restraint of undue preferences, are "but declaratory of what the common law now is." This is the view which, for the reasons already given, I deem correct.

But even if this result could not be reached by fair induction from the ancient principles which regulate the relationship between this class of bailees and their employers, I should still be of opinion that we would be necessarily led to it by another consideration.

I have insisted that a common carrier was to be regarded, to some extent at least, as clothed with a public capacity, and I now maintain, that even if this theory should be rejected, and thrown out of the argument, still the defendants must be considered as invested with that attribute. In my opinion, a railroad company, constituted under statutory authority, is not only, by force of its inherent nature, a common carrier, as was held in the case of Palmer *v.* Grand Junction Railway, 4 M. & W. 749, but it becomes an agent of the public in consequence of the powers conferred upon it. A company of this kind is invested with important prerogative franchises, among which are the rights to build and use a railway, and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. Although in the hands of a private corporation, they are still sovereign franchises, and must be used and treated as such; they must be held in trust for the general good. If they had remained under the control of the state, it could not be pretended, that in the exercise of them it would have been legitimate to favor one citizen at the expense of another. If a state should build and operate a railroad, the exclusion of everything like favoritism with respect to its use would seem to be an obligation that could not be disregarded without violating natural equity and fundamental principles. And it seems to me impossible to concede, that when such rights as these are handed over, on public considerations, to a company of individuals, such rights lose their essential characteristics. I think they are, unalterably, parts of the supreme authority, and in whatsoever hands they may be found,

they must be considered as such. In the use of such franchises, all citizens have an equal interest and equal rights, and all must, under the same circumstances, be treated alike. It cannot be supposed that it was the legislative intention, when such privileges were given, that they were to be used as private property, at the discretion of the recipient, but, to the contrary of this, I think an implied condition attaches to such grants, that they are to be held as a *quasi* public trust for the benefit, at least to a considerable degree, of the entire community. In their very nature and constitution, as I view this question, these companies become, in certain aspects, public agents, and the consequence is, they must, in the exercise of their calling, observe to all men a perfect impartiality. On these grounds, the contract now in suit must be deemed illegal in the very particular on which a recovery is sought.

The result is, the defendants must have judgment on the demurrer.

In the Court of Errors and Appeals, on error to the Supreme Court, the opinion of the Court was delivered by

BEDLE, J.[1] The business of the common carrier is for the public, and it is his duty to serve the public indifferently. He is entitled to a reasonable compensation, but on payment of that he is bound to carry for whoever will employ him, to the extent of his ability. A private carrier can make what contract he pleases. The public have no interest in that, but a service for the public necessarily implies equal treatment in its performance, when the right to the service is common. Because the institution, so to speak, is public, every member of the community stands on an equality as to the right to its benefit, and, therefore, the carrier cannot discriminate between individuals for whom he will render the service. In the very nature, then, of his duty and of the public right, his conduct should be equal and just to all. So, also, there is involved in the reasonableness of his compensation the same principle. A want of uniformity in price for the same kind of service under like circumstances is most unreasonable and unjust, when the right to demand it is common. It would be strange if, when the object of the employment is the public benefit, and the law allows no discrimination as to individual customers, but requires all to be accommodated alike as individuals, and for a reasonable rate, that by the indirect means of unequal prices some could lawfully get the advantage of the accommodation and others not. A direct refusal to carry for a reasonable rate would involve the carrier in damages, and a refusal, in effect, could be accomplished by unfair and unequal charges, or if not to that extent, the public right to the convenience and usefulness of the means of carriage could be greatly impaired. Besides, the injury is not only to the individual affected, but it reaches out, disturbing trade most seriously. Competition in trade is encouraged by the law, and to allow any one to use means established and intended for the public good, to promote un-

[1] Part of the opinion is omitted. — ED.

fair advantages amongst the people and foster monopolies, is against public policy, and should not be permitted. . . .

It must not be inferred that a common carrier, in adjusting his price, cannot regard the peculiar circumstances of the particular transportation. Many considerations may properly enter into the agreement for carriage or the establishment of rates, such as the quantity carried, its nature, risks, the expense of carriage at different periods of time, and the like; but he has no right to give an exclusive advantage or preference, in that respect, to some over others, for carriage, in the course of his business. For a like service, the public are entitled to a like price. There may be isolated exceptions to this rule, where the interest of the immediate parties is alone involved, and not the rest of the public, but the rule must be applied whenever the service of the carrier is sought or agreed for in the range of business or trade. This contract being clearly within it, and odious to the law in the respect on which a recovery is sought, cannot be sustained. But there is an additional ground upon which it is also objectionable. I entirely agree with the Chief Justice, that, in the grant of a franchise of building and using a public railway, that there is an implied condition that it is held as a *quasi* public trust, for the benefit of all the public, and that the company possessed of the grant must exercise a perfect impartiality to all who seek the benefit of the trust. It is true that these railroad corporations are private, and, in the nature of their business, are subject to and bound by the doctrine of common carriers, yet, beyond that, and in a peculiar sense, they are intrusted with certain functions of the government, in order to afford the public necessary means of transportation. The bestowment of these franchises is justified only on the ground of the public good, and they must be held and enjoyed for that end. This public good is common, and unequal and unjust favors are entirely inconsistent with the common right. So far as their duty to serve the public is concerned, they are not only common carriers, but public agents, and in their very constitution and relation to the public, there is necessarily implied a duty on their part, and a right in the public, to have fair treatment and immunity from unjust discrimination. The right of the public is equal in every citizen, and the trust must be performed so as to secure and protect it.

Every trust should be administered so as to afford to the *cestui que trust* the enjoyment of the use intended, and these railroad trustees must be held, in their relation to the public, to such a course of dealing as will insure to every member of the community the equal enjoyment of the means of transportation provided, subject, of course, to their reasonable ability to perform the trust. In no other way can trade and commercial interchange be left free from unjust interference. On this latter ground, that part of the contract in question is illegal.

The judgment of the Supreme Court must be affirmed.[1]

[1] See *acc.* Scofield *v.* Lake Shore & M. S. R. R., 43 Ohio St. 571. In this case ATHERTON, J., said: "I think that all the cases that have been referred to might be

318½ TONS OF COAL.

DISTRICT COURT OF THE UNITED STATES (CONN.), 1877.
CIRCUIT COURT OF THE UNITED STATES, 1878.

[14 *Blatch.* 453.][1]

LIBEL *in rem* for freight and demurrage.

The libellants carried a cargo of coal to New Haven, to be delivered to the Glasgow Co. at the Canal Railroad Dock. The consignee was located near the line of the railroad in Massachusetts. It was the custom of the port for coal, thus consigned to a railroad wharf, to be shovelled from the hold of the vessel into large buckets, let down and hauled up by a steam derrick, which discharged them into the cars of the railroad. Prior to 1871, the shovellers who filled the buckets had been hired and paid by the master of the vessel. In that year the Canal Railroad Co. made a rule that it would thereafter supply all coal vessels with shovellers, at ten cents a ton, and that no vessel could discharge except by using shovellers thus supplied. Ten cents a ton was then the ordinary rate of wages for such services, but in 1876 charges of shovellers fell, and they could be hired for eight cents. The libellants thereupon hired shovellers at eight cents, and refused to receive those furnished by the company, unless they would work at the same rate. The company for this cause refused to allow the cargo to be unloaded, and it was discharged at a neighboring wharf, after some delay, and there libelled.

SHIPMAN, J. If the rule is valid and reasonable, there was no delivery of the coal. If the rule is invalid or unreasonable, there was a delivery, or its equivalent, an offer and tender of delivery to the person entitled to receive the coal, at the usual and reasonable time and place, and in the reasonable manner of delivery, and a refusal to accept on the part of the railroad company. In the latter event, the contract of affreightment was complied with by the libellants, and freight was earned. No question was made as to the liability of the defendants under the bill of lading, for freight, in case the railroad company improperly refused to receive the coal. The bill of lading required delivery to the defendants at the Canal Dock. It is admitted that the company, upon notification that the coal was ready to be discharged,

harmonized by observing the distinction so often alluded to, that is to say that as between a consignor and the common carrier, where no other reason intervenes to engraft an exception on the rule, all the consignor can demand of the common carrier is, that his goods shall be carried at a reasonable rate, not necessarily at an equal rate with all others. But when the reduced rate is either intended to or has a natural tendency to injure the plaintiff in his business and destroy his trade, then a necessary exception is engrafted on the more general rule, and the plaintiff has then the right to insist that rates to all be made the same for goods shipped 'under like circumstances.'"— ED.

[1] The statement of facts is taken from the report of the same case, 4 Law & Equity Reporter, 105, and part of the opinion of SHIPMAN, J., is omitted. — ED.

replied that said cargo might be forthwith discharged, and would be received by it for the defendants.

The railroad company is not merely an owner of a private wharf, having restricted duties to perform towards the public. Such a wharf owner may properly construct his wharf for particular kinds of business, and may make rules to limit and to restrict the manner in which his property shall be used; (Croucher *v.* Wilder, 98 Mass. 322;) but the railroad company is a common carrier, and its wharf, occupied by railroad tracks, is the place provided by itself for the reception of goods which must be received and transported, in order to comply with its public obligations. The coal was to be received from the vessel by the railroad company, as the carrier next in line, and thence carried to its place of destination. The question which is at issue between the parties depends upon the power of a common carrier to establish rules which shall prescribe by what particular persons goods shall be delivered to him for transportation. "Common carriers undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to price. . . . As they hold themselves to the world as common carriers for a reasonable compensation, they assume to do, and are bound to do, what is required of them in the course of their employment, if they have the requisite convenience to carry, and are offered a reasonable or customary price; and, if they refuse, without some just ground, they are liable to an action." (2 Kent's Comm. 599.) A common carrier is under an obligation to accept, within reasonable limits, ordinary goods which may be tendered to him for carriage at reasonable times, for which he has accommodation. (Crouch *v.* L. & N. W. Railway Co., 14 C. B. 255.) The carrier cannot generally discriminate between persons who tender freight, and exclude a particular class of customers. The railroad company could not establish the rule that it would receive coal only from certain barge owners, or from a particular class of barge captains. It carries "for all people indifferently." But, while admitting this duty, the company has declared that, for the convenience of the public, and in order to transport coal more expeditiously, and to avoid delays, it will receive such coal only, from barges at its wharf, as shall be delivered through the agency of laborers selected by the company. This rule is a restriction upon its common law obligation. The carrier, on its part, is bound to receive goods from all persons alike. The duty and the labor of delivery to the carrier is imposed upon the barge owner, who pays for the necessary labor. The service, so far as the shovelling is concerned, is performed, not upon the property of the railroad company, but upon the deck of the vessel. The company is virtually saying to the barge owner, You shall employ upon your own property, in the service which you are bound to render, and for which you must pay, only the laborers whom we designate, and, though our general duty is to receive all ordinary goods delivered at reasonable

times, we will receive only those goods which may be handled by persons of our selection. The law relating to carriers has not yet permitted them to impose such limitations upon the reception or acceptance of goods. The carrier may properly impose reasonable restrictions in regard to the persons by whom he shall deliver goods to the consignee or the carrier next in line. The delivery of goods is the duty of the carrier, for which he is responsible, and should be in his own control. (Beadell *v.* Eastern Counties R. Co., 2 C. B. N. S. 509.) It would not be contended that the railroad company could designate the crew upon the barge, or could select the barge captains, and I am of opinion that it has no more authority over the selection of the other employees of the barge owners. The fact that the barge owners are using, for a compensation, the derricks and tubs of the railroad company, is not material. The berths under the derricks have been designated by the company, as proper places where coal is to be received, and, under reasonable circumstances as to time, and freedom from interference with prior occupants, the incoming barges properly occupy such positions. Delivery is impracticable at the places designated by the company for delivery, without the use of the railroad company's machinery.

It is true, that, under this rule, the delivery of coal into the cars of the railroad company has been more expeditiously performed, and has been attended with fewer delays than formerly, and that the rule has been a convenience to the consignees, but the convenience of the practice is not, of itself, an adequate reason for compelling its enforcement, if it interferes with the legal rights of others. I am not prepared to say, that, for the orderly management of an extensive through freighting business by means of connecting lines, and for the systematic and efficient transportation of immense quantities of goods, it may not hereafter be found a necessity that one or the other of the connecting lines shall be furnished with the power which is now sought by the railroad company; but, in the present condition of the coal traffic at the port of New Haven, this necessity does not exist. The power is a convenience to the railroad company. It is not a necessity for the transaction of business.

It is not necessary to consider the inconveniences which may flow from the rule, but the case discloses one practical inconvenience which may arise. The rule presupposes that the same price is to be charged by the employees furnished by the railroad company, which is generally paid by others for the same service. When prices are unvarying, no serious trouble results. There is no alternative, however, for the barge owners, but to pay the price which the railroad company declares to be the general price, or else submit to a refusal on the part of the railroad company to accept the coal. The barge captain may be able to obtain the service at a reduced rate, as he could have done in this case, but he must pay his own employees the regular tariff which the company has established, and then have the question of rates deter-

mined by litigation. The result would be, that annoying litigation or vexatious altercations would ensue. If the barge owners are to make the payment, they should have an opportunity to make their own contracts, and to take advantage of changes in the price of labor.

As matter of law, it is held that the rule is invalid, and that a valid delivery was made of the coal, whereby freight was earned in accordance with the terms of the contract. "Damages in the nature of demurrage are recoverable for detention beyond a reasonable time, in unloading only, and where there is no express stipulation to pay demurrage." (Wordin *v.* Bemis, 32 Conn. 268.)

The libellants are entitled to a decree for the freight at the rate mentioned in the bill of lading, less $19.55, the amount paid, to wit, the sum of $171.55, and for damages in the nature of demurrage, for a detention for six days, being $114.66.

The claimants appealed.

Simeon E. Baldwin and *William K. Townsend*, for the libellants.

Johnson T. Platt, for the claimants.

BLATCHFORD, J. The decision of this case in the District Court was placed upon the ground that the New Haven and Northampton Company, as a common carrier, had no right to impose on the canal-boat the requirement that it should, as a condition of the right to place the coal in the tubs of the company, attached to the company's derrick, employ, to place it there, shovellers designated by the company, and pay such shovellers the rate of compensation fixed by the company for such service. It is contended, in this court, by the claimants, that the District Court ignored the status of the company as a wharf owner; that the company, as the owner of the wharf, had the right to make reasonable rules in regard to the use of the wharf; that the company had a right, by statute, to exact seven cents per ton for coal discharged at its wharf, as wharfage; that the libellants' boat was not charged any such wharfage; that the use by the boat of the facilities provided by the company, in the way of derricks, hoisting engines, etc., is the use of the wharf; that all which the company did was to refuse to allow the boat to use those facilities, and thus use the wharf, unless it would permit the coal to be shovelled into the tubs by men designated by the company; and that this was only a reasonable regulation made by the company, as a wharf owner. The difficulty with this view of the case is, that the regulation was not sought to be enforced, in fact, as a regulation of wharfage, or of the use of the wharf by the boat. There was no charge made against the boat for the privilege of making fast to the wharf; and, if any payment was to be made for the use of the wharf, by depositing the coal on the wharf, it was to be made by the claimants, who were the owners of the coal and the employers of the company. According to the well understood acceptation of a bill of lading such as the one in question here, where the coal was deliverable "to Glasgow Co., Canal Dock, New Haven," — the Glasgow Company being a mill owner at a place on the line of the railroad company, and

the latter company being the owner of the Canal Dock at New Haven, with its tracks running to and on the dock, and having derricks and engines for hoisting the coal in tubs from the deck of the boat to the cars on the tracks, — the coal was delivered by the boat into the tubs, and the boat paid the company so much per ton for hoisting the coal and dumping it into the cars. The boat had nothing to do with paying anything for the use or occupation of the wharf by the coal, and it paid separately for the hoisting. If the company had a right to charge the boat for tying up to, and using the spiles on, the wharf, no such charge was made. There was, therefore, no foundation for the requirement as to the shovellers, in any relation between the company as a wharf owner and the boat.

The imposition of the requirement by the claimants' agent, as a common carrier, was not a reasonable one. In regard to this I concur entirely with the views of the District Judge, in his decision in the court below. He found that the regulation was not a necessary one. If it had been necessary and indispensable, it would have been reasonable. It might, indeed, have been reasonable without being necessary. But, to be reasonable, it mus be reasonable as respects both parties. In the present case, the effect of the requirement was to impose on the boat an unnecessary expense of two cents per ton of coal, for shovelling into the tubs.

There must be a decree for the libellants, in affirmance of the decree below, with costs.

HAYS *v.* THE PENNSYLVANIA COMPANY.

CIRCUIT COURT OF THE UNITED STATES, N. OHIO, 1882.

[12 *Fed.* 309.]

BAXTER, C. J. The plaintiffs were, for several years next before the commencement of this suit, engaged in mining coal at Salineville and near defendant's road, for sale in the Cleveland market. They were wholly dependent on the defendant for transportation. Their complaint is that the defendant discriminated against them, and in favor of their competitors in business, in the rates charged for carrying coal from Salineville to Cleveland. But the defendant traversed this allegation. The issue thus made was tried at the last term of the court, when it appeared in evidence that defendant's regular price for carrying coal between the points mentioned, in 1876, was $1.60 per ton, with a rebate of from 30 to 70 cents per ton to all persons or companies shipping 5,000 tons or more during the year, — the amount of rebate being graduated by the quantity of freight furnished by each shipper. Under this schedule the plaintiffs were required to pay higher rates on the coal shipped by them than were exacted from other and rival parties who shipped larger quantities. But the defend-

ant contended, if the discrimination was made in good faith, and for the purpose of stimulating production and increasing its tonnage, it was both reasonable and just, and within the discretion confided by law to every common carrier. The court, however, entertained the contrary opinion, and instructed the jury that the discrimination complained of and proven, as above stated, was contrary to law, and a wrong to plaintiffs, for which they were entitled to recover the damages resulting to them therefrom, to wit, the amount paid by the plaintiffs to the defendant for the transportation of their coal from Salineville to Cleveland (with interest thereon) in excess of the rates accorded by defendant to their most favored competitors. The jury, under these instructions, found for the plaintiffs, and assessed their damages at $4,585. The defendant thereupon moved for a new trial, on the ground that the instructions given were erroneous, and this is the question we are now called on to decide. If the instructions are correct the defendant's motion must be overruled; otherwise a new trial ought to be granted.

A reference to recognized elementary principles will aid in a correct solution of the problem. The defendant is a common carrier by rail. Its road, though owned by the corporation, was nevertheless constructed for public uses, and is, in a qualified sense, a public highway. Hence everybody constituting a part of the public, for whose benefit it was authorized, is entitled to an equal and impartial participation in the use of the facilities it is capable of affording. Its ownership by the corporation is in trust as well for the public as for the shareholders; but its first and primary obligation is to the public. We need not recount all these obligations. It is enough for present purposes to say that the defendant has no right to make unreasonable and unjust discriminations. But what are such discriminations? No rule can be formulated with sufficient flexibility to apply to every case that may arise. It may, however, be said that it is only when the discrimination enures to the undue advantage of one man, in consequence of some injustice inflicted on another, that the law intervenes for the protection of the latter. Harmless discrimination may be indulged in. For instance, the carrying of one person, who is unable to pay fare, free, is no injustice to other passengers who may be required to pay the reasonable and regular rates fixed by the company. Nor would the carrying of supplies at nominal rates to communities scourged by disease, or rendered destitute by floods or other casualty, entitle other communities to have their supplies carried at the same rate. It is the custom, we believe, for railroad companies to carry fertilizers and machinery for mining and manufacturing purposes to be employed along the lines of their respective roads to develop the country and stimulate productions, as a means of insuring a permanent increase of their business, at lower rates than are charged on other classes of freight, because such discrimination, while it tends to advance the interest of all, works no injustice to any one. Freight

carried over long distances may also be carried at a reasonably less rate per mile than freight transported for shorter distances, simply because it costs less to perform the service. For the same reason passengers may be divided into different classes, and the price regulated in accordance with the accommodations furnished to each, because it costs less to carry an emigrant, with the accommodations furnished to that class, than it does to carry an occupant of a palace car. And for a like reason an inferior class of freight may be carried at a less rate than first-class merchandise of greater value and requiring more labor, care, and responsibility in the handling. It has been held that 20 separate parcels done up in one package, and consigned to the same person, may be carried at a less rate per parcel than 20 parcels of the same character consigned to as many different persons at the same destination, because it is supposed that it costs less to receive and deliver one package containing 20 parcels to one man, than it does to receive and deliver 20 different parcels to as many different consignees.

Such are some of the numerous illustrations of the rule that might be given. But neither of them is exactly like the case before us, either in its facts or principles involved. The case of Nicholson *v.* G. W. R. Co., 4 C. B. (N. S.) 366, is in its facts more nearly like the case under consideration than any other case that we have been able to find. This was an application, under the railway and traffic act, for an injunction to restrain the railroad company from giving lower rates to the Ruabon Coal Company than were given to the complainant in that case, in the shipment of coal, in which it appeared that there was a contract between the railroad company and the Ruabon Coal Company, whereby the coal company undertook to ship, for a period of 10 years, as much coal for a distance of at least 100 miles over defendant's road as would produce an annual gross revenue of £40,000 to the railroad company, in fully loaded trains, at the rate of seven trains per week. In passing on these facts the court said that in considering the question of undue preference the fair interest of the railroad company ought to be taken into the account; that the preference or prejudice, referred to by the statute, must be undue or unreasonable to be within the prohibition; and that, although it was manifest that the coal company had many and important advantages in carrying their coal on the railroad as against the complainant and other coal owners, still the question remained, were they undue or unreasonable advantages? And this, the court said, mainly depended on the adequacy of the consideration given by the coal company to the railroad company for the advantages afforded by the latter to the coal company. And because it appeared that the cost of carrying coal in fully loaded trains, regularly furnished at the rate of seven trains per week, was less per ton to the railway company than coal delivered in the usual way, and at irregular intervals, and in unequal quantities, in connection with the coal company's undertaking to ship annually coal enough over defendant's road, for at least a distance of 100 miles, to produce a gross revenue to the railroad of

£40,000, the court held that the discrimination complained of in the case was neither undue nor unreasonable, and therefore denied the application.

This case seems to have been well considered, and we have no disposition to question its authority. Future experience may possibly call for some modification of the principle therein announced. But *this case* calls for no such modification, inasmuch as the facts of that case are very different, when closely analyzed, from the facts proven in this one. In the former the company, in whose favor the discrimination was made, gave, in the judgment of the court, an adequate consideration for the advantages conceded to it under and in virtue of its contract. It undertook to guaranty £40,000 worth of tonnage per year for 10 years to the railroad company, and to tender the same for shipment in fully loaded trains, at the rate of seven trains per week. It was in consideration of these obligations — which, in the judgment of the court, enabled the railroad company to perform the service at less expense — the court held that the advantages secured by the contract to the coal company were neither undue nor unreasonable. But there are no such facts to be found in this case. There was in this case no undertaking by any one to furnish any specific quantity of freight at stated periods; nor was any one bound to tender coal for shipment in fully loaded trains. In these particulars the plaintiffs occupied common ground with the parties who obtained lower rates. Each tendered coal for transportation in the same condition and at such times as suited his or their convenience. The discrimination complained of rested exclusively on the amount of freight supplied by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is, in some degree, subject to the will of railroad officials; for, if one man engaged in mining coal, and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from 25 to 50 cents per ton less than another competing with him in business, solely on the ground that he is able to furnish and does furnish the larger quantity for shipment, the small operator will sooner or later be forced to abandon the unequal contest and surrender to his more opulent rival. If the principle is sound in its application to rival parties engaged in mining coal, it is equally applicable to merchants, manufacturers, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success of all such enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same.

It is not difficult, with such a ruling, to forecast the consequences. The men who control railroads would be quick to appreciate the power with which such a holding would invest them, and, it may be, not slow to make the most of their opportunities, and perhaps tempted to favor their friends to the detriment of their personal or political opponents;

or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discriminations for or against them; or else, seeing the augmented power of capital, organize into overshadowing combinations and extinguish all petty competition, monopolize business, and dictate the price of coal and every other commodity to consumers. We say these results *might* follow the exercise of such a right as is claimed for railroads in this case. But we think no such power exists in them; they have been authorized for the common benefit of every one, and cannot be lawfully manipulated for the advantage of any class at the expense of any other. Capital needs no such extraneous aid. It possesses inherent advantages, which cannot be taken from it. But it has no just claim, by reason of its accumulated strength, to demand the use of the public highways of the country, constructed for the common benefit of all, on more favorable terms than are accorded to the humblest of the land; and a discrimination in favor of parties furnishing the largest quantity of freight, and solely on that ground, is a discrimination in favor of capital, and is contrary to a sound public policy, violative of that equality of right guaranteed to every citizen, and a wrong to the disfavored party, for which the courts are competent to give redress.

The motion, therefore, for a new trial will be denied, and a judgment entered on the verdict for the damages assessed and the costs of the suit.

WELKER, D. J., concurred.

MENACHO *v.* WARD.

CIRCUIT COURT OF THE UNITED STATES, S. NEW YORK, 1886.

[27 *Fed.* 529.]

WALLACE, J. The complainants have filed a bill in each of these causes to restrain the defendants from making discriminations for transportation against the complainants, which consist in charging them a higher rate of freight than is charged by defendants to other shippers of merchandise generally. A motion is now made for a preliminary injunction. The facts in each case are essentially the same, and both cases may be considered together.

The complainants are merchants domiciled in the city of New York, and engaged in commerce between that port and the island of Cuba. The defendants are proprietors or managers of steamship lines plying between New York and Cuba. Formerly the business of transportation between the two places was carried on by sailing vessels. In 1877 the line of steamships known as "Ward's Line" was established, and in 1881 was incorporated by the name of the New York & Cuba Mail Steamship Line under the general laws of the State of New York. At

the time of the incorporation of this company the line of steamships owned by the defendants Alexandre & Sons had also been established. These two lines were competitors between New York and Cuba, but for several years both lines have been operated under a traffic agreement between themselves, by which uniform rates are charged by each to the public for transportation. The two lines are the only lines engaged in the business of regular transportation between New York and Cuba; and unless merchants choose to avail themselves of the facilities offered by them, they are obliged to ship their merchandise by vessels or steamers which may casually ply between the two places.

It is alleged by the complainant that the defendants have announced generally to New York merchants engaged in Cuban trade that they must not patronize steamships which offer for a single voyage, and on various occasions when other steamships have attempted to procure cargoes from New York to Havana have notified shippers that those employing such steamships would thereafter be subjected to onerous discriminations by the defendants. The defendants allege in their answer to the bill, in effect, that it has been found necessary, for the purpose of securing sufficient patronage, to make differences in rates of freight between shippers in favor of those who will agree to patronize the defendants exclusively. Within a few months before the commencement of this suit two foreign steamers were sent to New York to take cargoes to Havana, and the complainants were requested to act as agents. Thereupon the complainants were notified by the defendants that they would be "placed upon the black-list" if they shipped goods by these steamers, and that their rates of freight would thereafter be advanced on all goods which they might have occasion to send by the defendants. Since that time the defendants have habitually charged the complainants greater rates of freight than those merchants who shipped exclusively by the defendants. The freight charges, by the course of business, are paid by consignees at the Cuban ports. The complainants have attempted to pay the freight in advance, but have found this course impracticable because their consignees are precluded from deducting damages or deficiencies upon the arrival of the goods from the charges for freight, and as a result some of the complainants' correspondents in Cuba refuse to continue business relations with them, being unwilling to submit to the annoyance of readjusting overcharges with complainants. Upon this state of facts the complainants have founded the allegation of their bill that the defendants "have arbitrarily refused them equal terms, facilities, and accommodations to those granted and allowed by the defendants to other shippers, and have arbitrarily exacted from them a much greater rate of freight than the defendants have at the same time charged to shippers of merchandise generally as a condition of receiving and transporting merchandise." They apply for an injunction upon the theory that their grievances cannot be redressed by an action at law.

It is contended for the complainants that a common carrier owes an

equal duty to every member of the community, and is not permitted to make unequal preferences in favor of one person, or class of persons, as against another person or class. The defendants insist that it is permitted to common carriers to make reasonable discriminations in the rates demanded from the public; that they are not required to carry for all at the same rates; that discriminations are reasonable which are based upon the quantity of goods sent by different shippers; and that the discrimination in the present case is essentially such a discrimination, and has no element of personal preference, and is necessary for the protection of the defendants.

Unquestionably a common carrier is always entitled to a reasonable compensation for his services. Hence it follows that he is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preferences in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and except as thus restricted he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relations with the public. Baxendale *v.* Eastern Counties R. Co., 4 C. B. (N. S.) 78; Branley *v.* Southeastern R. Co., 12 C. B. (N. S.) 74; Fitchburg R. Co. *v.* Gage, 12 Gray, 393; Sargent *v.* Boston & L. R. Corp., 115 Mass. 416, 422.[1]

In the present case the question whether the defendants refuse to carry for the complainants at a reasonable compensation resolves itself into another form. Can the defendants lawfully require the complainants to pay more for carrying the same kind of merchandise, under like conditions, to the same places, than they charge to others, because the complainants refuse to patronize the defendants exclusively, while other shippers do not? The fact that the carrier charges some less than others for the same service is merely evidence for the latter, tending to show that he charges them too much; but when it appears that the charges are greater than those ordinarily and uniformly made to others for similar services, the fact is not only competent evidence against the carrier, but cogent evidence, and shifts upon him the burden of justifying the exceptional charge. The estimate placed by a party upon the value of his own services of property is always sufficient, against him, to establish the real value; but it has augmented probative force, and is almost conclusive against him, when he has adopted it in a long continued and extensive course of business dealings, and held it out as a fixed and notorious standard for the information of the public.

The defendants assume to justify upon the theory that a carrier may regulate his charges upon the basis of the quantity of goods delivered to him for transportation by different shippers, and that their discrimination against the plaintiff is in substance one made with reference to

[1] The court here cited passages from the opinions in Messenger *v.* Pennsylvania R. R., 37 N. J. L. 531, and McDuffee *v.* Portland & R. R. R., 52 N. H. 430. — Ed.

the quantity of merchandise furnished by them for carriage. Courts of law have always recognized the rights of carriers to regulate their charges with reference to the quantity of merchandise carried for the shipper, either at a given shipment, or during a given period of time, although public sentiment in many communities has objected to such discriminations, and crystallized into legislative condemnation of the practice. By the English statutes (17 & 18 Vict. c. 31) railway and canal carriers are prohibited from "giving any undue or unreasonable preference or advantage to or in favor of any particular description of traffic, in any respect whatever," in the receiving, forwarding, and delivery of traffic; but under these provisions of positive law the courts have held that it is not an undue preference to give lower rates for larger quantities of freight. Ransome *v.* Eastern C. R. Co., 1 Nev. & McN. 63, 155; Nicholson *v.* Great Western Ry. Co., Id. 121; Strick *v.* Swansea Canal Co., 16 C. B. (N. S.) 245; Greenop *v.* S. E. R. Co., 2 Nev. & McN. 319.

These decisions proceed upon the ground that the carrier is entitled to take into consideration the question of his own profits and interests in determining what charges are reasonable. He may be able to carry a large quantity of goods, under some circumstances, at no greater expense than would be required to carry a smaller quantity. His fair compensation for carrying the smaller quantity might not be correctly measured by the rate per pound, per bushel, or per mile charged for the larger. If he is assured of regular shipments at given times, he may be able to make more economical arrangements for transportation. By extending special inducements to the public for patronage he may be able to increase his business, without a corresponding increase of capital or expense in transacting it, and thus derive a larger profit. He is therefore justified in making discriminations by a scale of rates having reference to a standard of fair remuneration of all who patronize him. But it is impossible to maintain that any analogy exists between a discrimination based upon the quantity of business furnished by different classes of shippers, and one which altogether ignores this consideration, and has no relation to the profits or compensation which the carrier ought to derive for a given quantum of service.

The proposition is speciously put that the carrier may reasonably discriminate between two classes of shippers, the regular and the casual; and that such is the only discrimination here. Undoubtedly the carrier may adopt a commutative system, whereby those who furnish him a regular traffic may obtain reduced rates, just as he may properly regulate his charges upon the basis of the quantity of traffic which he receives from different classes of shippers. But this is not the proposition to be discussed. The defendants assume to discriminate against the complainants, not because they do not furnish them a regular business, or a given number of shipments, or a certain quantity of merchandise to carry, but because they refuse to patronize the defendants exclusively. The question is whether the defendants refuse to carry for

the complainants on reasonable terms. The defendants, to maintain the affirmative, assert that their charges are fair because they do not have the whole of the complainants' carrying business. But it can never be material to consider whether the carrier is permitted to enjoy a monopoly of the transportation for a particular individual, or class of individuals, in ascertaining what is reasonable compensation for the services actually rendered to him or them. Such a consideration might be influential in inducing parties to contract in advance; but it has no legitimate bearing upon the value of services rendered without a special contract, or which are rendered because the law requires them to be rendered for a fair remuneration.

A common carrier "is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself." Nelson, J., in New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344. His obligations and liabilities are not dependent upon contract, though they may be modified and limited by contract. They are imposed by the law, from the public nature of his employment. Hannibal R. R. *v.* Swift, 12 Wall. 262. As their business is "affected with a public interest," it is subject to legislative regulation. "In matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable." Waite, C. J., in Munn *v.* Illinois, 94 U. S. 113, 134. It is upon this foundation, and not alone because the business of common carriers is so largely controlled by corporations exercising under franchises the privileges which are held in trust for the public benefit, that the courts have so strenuously resisted their attempts, by special contracts or unfair preferences, to discriminate between those whom it is their duty to serve impartially. And the courts are especially solicitous to discountenance all contracts or arrangements by these public servants which savor of a purpose to stifle competition or repress rivalry in the departments of business in which they ply their vocation. Illustrations are found in the cases of State *v.* Hartford & N. H. R. Co., 29 Conn. 538; Hooker *v.* Vandewater, 4 Denio, 349; W. U. Tel. Co. *v.* Chicago & P. R. Co., 86 Ill. 246; Coe *v.* Louisville & N. R. Co., 3 Fed. Rep. 775.

The vice of the discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer. Its tendency is to deprive the public of their legitimate opportunities to obtain carriage on the best terms they can. If it is tolerated it will result practically in giving the defendants a monopoly of the carrying trade between these places. Manifestly it is enforced by the defendants in order to discourage all others from attempting to serve the public as carriers between these places. Such discrimination is not only unreasonable, but is odious. Ordinarily the remedy against a carrier is at law for damages for a refusal to carry, or to recover the excess of

charges paid to obtain the delivery of goods. The special circumstances in this case indicate that such a remedy would not afford complete and adequate redress, "as practical and efficient to the ends of justice" as the remedy in equity. Watson *v.* Sutherland, 5 Wall. 74.

The motion for an injunction is granted.

ROOT *v.* LONG ISLAND RAILROAD.

COURT OF APPEALS OF NEW YORK, SECOND DIVISION, 1889.

[114 *N. Y.* 300; 21 *N. E.* 403.]

HAIGHT, J. In June, 1876, the defendant and one Quintard entered into a written contract, which, among other things, provided that Quintard should build at Long Island City upon the lands of the defendant a dock 250 feet long and 40 feet wide, and erect thereon a pocket for holding and storing coal, according to certain plans and specifications annexed. The defendant was to have the use of the south side of the dock, and also of 30 feet of the shore end, and the right to use the other portions thereof when not required by Quintard. In consideration therefor the defendant agreed with Quintard to transport in its cars all the coal in car-loads offered for transportation by him at a rebate of 15 cents per ton of 2,240 pounds from the regular tariff rates for coal transported by the defendant from time to time, except in the case of the coal carried for the Brooklyn Water-Works Company, with which company the defendant reserved the right to make a special rate, which should not be considered "the regular tariff rate." The defendant also agreed with Quintard to provide him with certain yard room and office room free of rent, and the contract was to continue for the term of 10 years, and at the termination of the contract the dock and structures were to be appraised, and the value thereof, less the sum of $2,000 advanced by the defendant, to be paid to Quintard. Pursuant to this agreement the dock and coal pocket were constructed at an expense of $17,000, and coal in large quantities was shipped over the defendant's road by Quintard or his assignee under the contract, and it is for the rebate of 15 cents per ton upon the coal so shipped that this action was brought. The defence is that the contract was against public policy, and was therefore illegal and void.

The defendant is a railroad corporation organized under the laws of the State, and was therefore a common carrier of passengers and freight, and was subject to the duties and liabilities of such. These duties and liabilities have often been the subject of judicial consideration in the different States of the Union. In Illinois it has been held that a railroad corporation, although permitted to establish its rates for transportation, must do so without injurious discrimination

to individuals; that its charges must be reasonable. Railroad Co. *v.* People, 67 Ill. 11; Vincent *v.* Railroad Co., 49 Ill. 33. In Ohio it was held that where a railroad company gave a lower rate to a favored shipper with the intent to give such shipper an exclusive monopoly, thus affecting the business and destroying the trade of other shippers, the latter have the right to require an equal rate for all under like circumstances. Scofield *v.* Railway Co., 43 Ohio St. 571. In New Jersey it has been held that an agreement by a railroad company to carry goods for certain persons at a cheaper rate than it would carry under the same condition for others is void, as creating an illegal preference; that common carriers are public agents, transacting their business under an obligation to observe equality towards every member of the community, to serve all persons alike, without giving unjust or unreasonable advantages by way of facilities for the carriage, or rates for the transportation, of goods. Messenger *v.* Railroad Co., 36 N. J. Law, 407; State *v.* Railroad Co., 48 N. J. Law, 55. In New Hampshire it has been held that a railroad is bound to carry at reasonable rates commodities for all persons who offer them, as early as means will allow; that it cannot directly exercise unreasonable discrimination as to who and what it will carry; that it cannot impose unreasonable or unequal terms, facilities, or accommodations. McDuffee *v.* Railroad, 52 N. H. 430. To similar effect are cases in other States. Express Co. *v.* Railroad Co., 57 Me. 188; Shipper *v.* Railroad Co., 47 Pa. St. 338; Railroad Co. *v.* Gage, 12 Gray, 393; Menacho *v.* Ward, 27 Fed. Rep. 529. In New York the authorities are exceedingly meagre. The question was considered to some extent in the case of Killmer *v.* Railroad Co., 100 N. Y. 395, in which it was held that the reservation in the general act of the power of the legislature to regulate and reduce charges, where the earnings exceeded 10 per cent of the capital actually expended, did not relieve the company from its common law duty as a common carrier; that the question as to what was a reasonable sum for the transportation of goods on the lines of a railroad in a given case is a complex question, into which enter many elements for consideration.

In determining the duty of a common carrier, we must be reasonable and just. The carrier should be permitted to charge reasonable compensation for the goods transported. He should not, however, be permitted to unreasonably or unjustly discriminate against other individuals, to the injury of their business, where the conditions are equal. So far as is reasonable, all should be treated alike; but we are aware that absolute equality cannot in all cases be required, for circumstances and conditions may make it impossible or unjust to the carrier. The carrier may be able to carry freight over a long distance at a less sum than he could for a short distance. He may be able to carry a large quantity at a less rate than he could a smaller quantity. The facilities for loading and unloading may be different in different places, and the expenses may be greater in some places than in others.

Numerous circumstances may intervene which bear upon the cost and expenses of transportation, and it is but just to the carrier that he be permitted to take these circumstances into consideration in determining the rate or amount of his compensation. His charges must therefore be reasonable, and he must not unjustly discriminate against others, and in determining what would amount to unjust discrimination all the facts and circumstances must be taken into consideration. This raises a question of fact, which must ordinarily be determined by the trial court. The question as to whether there was unjust discrimination embraced in the provisions of the contract does not appear to have been determined by the referee, for no finding of fact appears upon that subject. Neither does it appear that he was requested to find upon that question, and consequently there is no exception to the refusal to find thereon. Unless, therefore, we can determine the question as one of law, there is nothing upon this subject presented for review in this court. Is the provision of the contract, therefore, providing for a rebate of 15 cents per ton from the regular tariff rates, an unjust discrimination as a matter of law? Had this provision stood alone, unqualified by other provisions, without the circumstances under which it was executed explaining the necessity therefor, we should be inclined to the opinion that it did provide for an unjust discrimination; but, upon referring to the contract, we see that the rebate was agreed to be paid in consideration for the dock and coal pocket which was to be constructed upon the defendant's premises at an expense of $17,000, in part for the use and convenience of the defendant. Quintard was to load all the cars with the coal that was to be transported. It was understood that a large quantity of coal was to be shipped over defendant's line, thus increasing the business and income of the company. The facilities which Quintard was to provide for the loading of the coal, his services in loading the cars, the large quantities which he was to ship, in connection with the large sums of money that he had expended in the erection of the dock, in part for the use and accommodation of the defendant, are facts which tend to explain the provision of the contract complained of, and render it a question of fact for the determination of the trial court as to whether or not the rebate, under the circumstances of this case, amounted to an unjust discrimination, to the injury and prejudice of others. Therefore, in this case, the question is one of fact, and not of law; and, inasmuch as the discrimination has not been found to be unjust or unreasonable, the judgment cannot be disturbed.[1]

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

[1] A paragraph discussing a question of fact is omitted. — Ed.

LOUGH *v.* OUTERBRIDGE.

COURT OF APPEALS OF NEW YORK, 1894.

[143 *N. Y.* 271; 38 *N. E.* 292.]

O'BRIEN, J. The question presented by this appeal is one of very great importance. It touches commerce, and, more especially, the duties and obligations of common carriers to the public at many points. There was no dispute at the trial, and there is none now, with respect to the facts upon which it arises. In order to present the question clearly, a brief statement of these facts becomes necessary. The plaintiffs are the surviving members of a firm that, for many years prior to the transaction upon which the action was based, had been engaged in business as commission merchants in the city of New York, transacting their business mainly with the Windward and Leeward Islands. The defendant, the Quebec Steamship Company, is a Canadian corporation, organized and existing under the laws of Canada; and the other defendants are the agents of the corporation in New York, doing business as partners. The business of the corporation is that of a common carrier, transporting passengers and freight for hire upon the sea and adjacent waters. For nearly 20 years prior to the transaction in question, a part of its business was the transportation of cargoes between New York and the Barbadoes and the Windward Islands, the other defendants acting as agents in respect to this business. During some years prior to the commencement of this action, the company had in its service a fleet of five or six of the highest class iron steamers, sailing at intervals of about ten days from New York to the islands, each steamer requiring about six weeks to make the trip. The steamers were kept constantly engaged in this service and sailed regularly upon schedule days without reference to the amount of cargo then received. The regular and standard rate charged for freight up to December, 1891, from New York to Barbadoes, one of the Windward Islands, was 50 cents per dry barrel of five cubic feet, which was taken as the unit of measurement, and the tariff of charges was adjusted accordingly for goods shipped in other forms and packages. In December, 1891, the regular rate was reduced from 50 to 40 cents per dry barrel. About this time the British steamer El Callao, which had for some years before sailed between New York and Ciudad Bolivar, in South America, transporting passengers and freight between these points, began to take cargo at New York for Barbadoes, and sometimes to other points in the Windward Islands which she passed on her regular trips to Ciudad Bolivar, sailing from New York at intervals of five or six weeks. Her trade with South America was the principal feature of her business, but such space as was not required for the cargo destined for the end of the route was filled with cargo for the islands which lay

in her regular course. The defendants evidently regarded this vessel as a somewhat dangerous competitor for a part of the business, the benefits of which they had up to this time enjoyed; and, for the purpose of retaining it, they adopted the plan of offering special reduced rates of 25 cents per dry barrel to all merchants and business men in New York who would agree to ship by their line exclusively during the week that the El Callao was engaged in obtaining freight and taking on cargo. The plaintiffs' firm had business arrangements with and were shipping by that vessel; and in February, 1892, they demanded of the defendants that they receive 3,000 barrels of freight from New York to Barbadoes, and transport the same at the special rate of 25 cents per barrel upon one of its steamers. The defendants then informed the plaintiffs that the rate of 25 cents was allowed by them only to such shippers as stipulated to give all their business exclusively to the defendants' line, in preference to the El Callao, and that to all other shippers the standard rate of 40 cents per dry barrel was maintained; but they further informed the plaintiffs that, if they would agree to give their shipments for that week exclusively to the defendants' line, the goods would be received at the 25 cents rate. The plaintiffs, however, were shipping by the other vessel, and declined this offer. Again, in the month of May, 1892, the El Callao was in the port of New York taking on cargo, as was also the defendants' steamer Trinidad. The plaintiffs then demanded of the defendants that they receive and carry from New York to Barbadoes about 1,760 dry barrels of freight at the rate of 25 cents. The defendants notified the plaintiffs that a general offer had that day been made by them to the trade to take cargo for Barbadoes on the Trinidad, to sail on June 4th, at 25 cents per dry barrel, under an agreement that shippers accepting that rate should bind themselves not to ship to that point by steamers of any other line between that date and the sailing of the Trinidad. The defendants offered these terms to the plaintiffs, but, as they were shipping by the rival vessel, the offer was declined. Except during the week when the El Callao was engaged in taking on cargo, the defendants have maintained the regular rate of 40 cents to all shippers between these points; and, when it reduced the rate as above described, exactly the same rates, terms, and conditions were offered to all shippers, including the plaintiffs, and carried freight for other parties at the reduced rates only upon their entering into a stipulation not to ship by the rival vessel. After the plaintiffs' demand last mentioned had been refused, they obtained an order from one of the judges of the court in this action requiring the defendants to carry the 1,760 barrels, and the defendants did receive and transport them, in obedience to the order, at the rate of 25 cents; but this order was reversed at general term. The plaintiffs demand equitable relief in the action to the effect, substantially, that the defendants be required and compelled by the judgment of the court to receive and transport for the plaintiffs their

freight at the special reduced rates, when allowed to all other shippers, without imposing the condition that the plaintiffs stipulate to ship during the times specified by the defendants' line exclusively.

Whether the regular rate of 40 cents, for which it is conceded that the defendants offered to carry for the plaintiffs at all times without conditions, was or was not reasonable, was a question of fact to be determined upon the evidence at the trial; and the learned trial judge has found as matter of fact that it was reasonable, and that the reduced rate of 25 cents granted to shippers on special occasions, and upon the conditions and requirements mentioned, was not profitable. This finding, which stands unquestioned upon the record, seems to me to be an element of great importance in the case, which must be recognized at every stage of the investigation. A common carrier is subject to an action at law for damages in case of refusal to perform its duties to the public for a reasonable compensation, or to recover back the money paid when the charge is excessive. This right to maintain an action at law upon the facts alleged, it is urged by the learned counsel for the defendants, precludes the plaintiffs from maintaining a suit for equitable relief such as is demanded in the complaint. There is authority in other jurisdictions to sustain the practice adopted by the plaintiffs (Watson *v.* Sutherland, 5 Wall. 74; Menacho *v.* Ward, 27 Fed. 529; Toledo, A. A. & N. M. Ry. Co. *v.* Pennsylvania Co., 54 Fed. 741; Coe & Milsom *v.* Railroad Co., 3 Fed. 775; Vincent *v.* Railroad Co., 49 Ill. 33; Scofield *v.* Railroad Co., 43 Ohio St. 571), though I am not aware of any in this State that would bring a case based upon such facts within the usual or ordinary jurisdiction of equity. So far as this case is concerned, it is sufficient to observe that it is now settled by a very general concurrence of authority that a defendant cannot, when sued in equity, avail himself of the defence that an adequate remedy at law exists, unless he pleads that defence in his answer. Cogswell *v.* Railroad Co., 105 N. Y. 319; Town of Mentz *v.* Cook, 108 N. Y. 504; Ostrander *v.* Weber, 114 N. Y. 95; Dudley *v.* Congregation, 138 N. Y. 460; Truscott *v.* King, 6 N. Y. 147.

When the facts alleged are sufficient to entitle the plaintiff to relief in some form of action, and no objection has been made by the defendant to the form of the action in his answer or at the trial, it is too late to raise the point after judgment or upon appeal. So that, whatever objections might have been urged originally against the action in its present form, the defendants must now be deemed to have waived them. This court will not now stop to examine a minor question that does not touch the merits, but relates wholly to the form in which the plaintiffs have presented the facts and demanded relief, or to the practice and procedure. The time and place to raise and discuss these questions was at or before the trial, and, as they were not then raised, the case must be examined and disposed of upon the merits. The defendants were engaged in a business in which the

public were interested, and the duties and obligations growing out of it may be enforced through the courts and the legislative power. Munn *v.* Illinois, 94 U. S. 113; People *v.* Budd, 117 N. Y. 1. In England these duties are, to a great extent, regulated by the railway and canal traffic act (17 & 18 Vict., c. 31), and by statute in some of the States, and in this country, so far as they enter into the business of interstate commerce, by act of Congress. The solution of the question now presented depends upon the general principles of the common law, as there is no statute in this State that affects the question, and the legislation referred to is important only for the purpose of indicating the extent to which business of this character has been subjected to public regulation for the general good. There can be no doubt that at common law a common carrier undertook generally, and not as a casual occupation, to convey and deliver goods for a reasonable compensation as a business, with or without a special agreement, and for all people indifferently; and, in the absence of a special agreement, he was bound to treat all alike in the sense that he was not permitted to charge any one an excessive price for the services. He has no right in any case while engaged in this public employment to exact from any one anything beyond what under the circumstances is reasonable and just. 2 Kent, Comm. (13th ed.) 598; Story, Bailm. §§ 495, 508; 2 Pars. Cont. 175; Killmer *v.* Railroad Co., 100 N. Y. 395; Root *v.* Railroad Co. 114 N. Y. 300. It may also be conceded that the carrier cannot unreasonably or unjustly discriminate in favor of one or against another where the circumstances and conditions are the same. The question in this case is whether the defendants, upon the undisputed facts contained in the record, have discharged these obligations to the plaintiffs. There was no refusal to carry for a reasonable compensation. On the contrary, the defendants offered to transport the goods for the 40 cents rate, and we are concluded by the finding as to the reasonable nature of that charge. The defendants even offered to carry them at the unprofitable rate of 25 cents, providing the plaintiffs would comply with the same conditions upon which the goods of any other person were carried at that rate. What is reasonable and just in a common carrier in a given case is a complex question, into which enter many elements for consideration. The questions of time, place, distance, facilities, quantity, and character of the goods, and many other matters must be considered. The carrier can afford to carry 10,000 tons of coal and other property to a given place for less compensation per ton than he could carry 50; and, where the business is of great magnitude, a rebate from the standard rate might be just and reasonable, while it could not fairly be granted to another who desired to have a trifling amount of goods carried to the same point. So long as the regular standard rates maintained by the carrier and offered to all are reasonable, one shipper cannot complain because his neighbor, by reason of special circumstances and conditions, can make it an object for the

carrier to give him reduced rates. In this case the finding implies that the defendants at certain times carried goods at a loss, upon the condition that the shippers gave them all of their business. Whatever effect may be given to the legislation referred to, in its application to railroads and other corporations deriving their powers and franchises from the State, there can be no doubt that the carrier could at common law make a discount from its reasonable general rates in favor of a particular customer or class of customers in isolated cases, for special reasons, and upon special conditions, without violating any of the duties or obligations to the public inherent in the employment. If the general rates are reasonable, a deviation from the standard by the carrier in favor of particular customers, for special reasons not applicable to the whole public, does not furnish to parties not similarly situated any just ground for complaint. When the conditions and circumstances are identical, the charges to all shippers for the same service must be equal. These principles are well settled, and whatever may be found to the contrary in the cases cited by the learned counsel for the plaintiff originated in the application of statutory regulations in other States and countries. Railroad Co. *v.* Gage, 12 Gray, 393; Sargent *v.* Railroad Co., 115 Mass. 422; Steamship Co. *v.* McGregor, 21 Q. B. Div. 544, affirmed 23 Q. B. Div. 598, and by H. L. 17 App. Cas. 25; Evershed *v.* Railway Co., 3 Q. B. Div. 135; Baxendale *v.* Railroad Co., 4 C. B. (N. S.) 78; Branley *v.* Railroad Co., 12 C. B. (N. S.) 74.

Special favors in the form of reduced rates to particular customers may form an element in the inquiry whether, as matter of fact, the standard rates are reasonable or otherwise. If they are extended to such persons at the expense of the general public, the fact must be taken into account in ascertaining whether a given tariff of general prices is or is not reasonable. But, as in this case the reasonable nature of the price for which the defendants offered to carry the plaintiffs' goods has been settled by the findings of the trial court, it will not be profitable to consider further the propriety or effect of such discrimination. The rule of the common law was thus broadly stated by the Supreme Court of Massachusetts in the case of Railroad Co. *v.* Gage, *supra*. Upon that point the court said: "The recent English cases, cited by the counsel for the defendants, are chiefly commentaries upon the special legislation of Parliament regulating the transportation of freight on railroads constructed under the authority of the government there, and consequently throw very little light upon questions concerning the general rights and duties of common carriers, and are for that reason not to be regarded as authoritative expositions of the common law upon these subjects. The principle derived from that source is very simple. It requires equal justice to all. But the equality which is to be observed consists in the restricted right to charge a reasonable compensation, and no more. If the carrier confines himself to this, no wrong can be done.

If, for special reasons in isolated cases, the carrier sees fit to stipulate for the carriage of goods of any class for individuals, for a certain time, or in certain quantities, for a less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without entitling all parties to the same advantage." In Evershed *v.* Railway Co., *supra*, Lord Bramwell remarked: "I am not going to lay down a precise rule, but, speaking generally, and subject to qualification, it is open to a railway company to make a bargain with a person, provided they are willing to make the same bargain with any other, though that other may not be in a situation to make it. An obvious illustration may be found in season tickets." The authorities cited seem to me to remove all doubt as to the right of a carrier, by special agreement, to give reduced rates to customers who stipulate to give them all their business, and to refuse these rates to others who are not able or willing to so stipulate, providing, always, that the charge exacted from such parties for the service is not excessive or unreasonable. The principle of equality to all, so earnestly contended for by the learned counsel for the plaintiffs, was not, therefore, violated by the defendants, since they were willing and offered to carry the plaintiffs' goods at the reduced rate, upon the same terms and conditions that these rates were granted to others; and, if the plaintiffs were unable to get the benefit of such rate, it was because, for some reason, they were unable or unwilling to comply with the conditions upon which it was given to their neighbors, and not because the carrier disregarded his duties or obligations to the public. The case of Menacho *v.* Ward, 27 Fed. 529, does not apply, because the facts were radically different. That action was to restrain the carrier from exacting unreasonable charges habitually for services, the charges having been advanced as to the parties complaining, for the reason that they had at times employed another line. It decides nothing contrary to the general views here stated. On the contrary, the court expressly recognized the general rule of the common law with respect to the obligations and duties of the carrier substantially as it is herein expressed, as will be seen from the following paragraph in the opinion of Judge Wallace: "Unquestionably, a common carrier is always entitled to a reasonable compensation for his services. Hence it follows that he is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than a fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preference in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and, except as thus restricted, he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relations with the public."

But it is urged that the plaintiffs were in fact the only shippers of

goods from New York to Barbadoes by the El Callao, and therefore the condition imposed that the reduced rate should be granted only to such merchants as stipulated to give the defendants their entire business, while in terms imposed upon the public generally, was in fact aimed at the plaintiffs alone. The trial court refused to find this fact, but, assuming that it appeared from the undisputed evidence, I am unable to see how it could affect the result. The significance which the learned counsel for the plaintiffs seems to give to it in his argument is that it conclusively shows the purpose of the defendants to compel the plaintiffs to withdraw their patronage from the other line, to suppress competition in the business, and to retain a monopoly for their own benefit. Conceding that such was the purpose, it is not apparent how any obligation that the defendants owed to the public was disregarded. We have seen that the defendants might lawfully give reduced rates in special cases, and refuse them in others, where the conditions are different, or to the general public, where the regular rates are reasonable. The purpose of an act which in itself is perfectly lawful, or, under all the circumstances, reasonable, is seldom, if ever, material. Phelps *v.* Nowlen, 72 N. Y. 39; Kiff *v.* Youmans, 86 N. Y. 324. The mere fact that the transportation business between the two points in question was in the hands of the defendants did not necessarily create a monopoly, if the general rates maintained were reasonable and just. It is not pretended that the owners of the El Callao proposed to give regular service to the general public for any less. When the service is performed for a reasonable and just hire, the public have no interest in the question whether one or many are engaged in it. The monopoly which the law views with disfavor is the manipulation of a business in which the public are interested in such a way as to enable one or a few to control and regulate it in their own interest, and to the detriment of the public, by exacting unreasonable charges. But when an individual or a corporation has established a business of a special and limited character, such as the defendants in this case had, they have a right to retain it by the use of all lawful means. That was what the defendants attempted to do against a competitor that engaged in it, not regularly or permanently, but incidentally and occasionally. The means adopted for this purpose was to offer the service to the public at a loss to themselves whenever the competition was to be met, and, when it disappeared, to resume the standard rates, which, upon the record, did not at any time exceed a reasonable and fair charge. I cannot perceive anything unlawful or against the public good in seeking by such means to retain a business which it does not appear was of sufficient magnitude to furnish employment for both lines. On this branch of the argument the remarks of Lord Coleridge in the case of Steamship Co. *v.* McGregor, *supra*, are applicable: "The defendants are traders, with enormous sums of money embarked in their adventure, and naturally and allowably desire to reap a profit from their trade. They have a

right to push their lawful trades by all lawful means. They have a right to endeavor, by lawful means, to keep their trade in their own hands, and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing, by profitable offers, customers to deal with them, rather than with their rivals. It follows that they may, if they see fit, endeavor to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of their profitable offers. I do not think it matters that the withdrawal of the advantages is out of all proportion to the injury inflicted by those who withdraw them on the customers who decline to deal exclusively with them dealing with other traders." The courts, I admit, should do nothing to lessen or weaken the restraints which the law imposes upon the carrier, or in any degree to impair his obligation to serve all persons indifferently in his calling, in the absence of a reasonable excuse, and for a reasonable compensation only; but to hold, as we are asked to in this case, that the plaintiffs were entitled to have their goods carried by the defendants at an unprofitable rate, without compliance with the conditions upon which it was granted to all others, and which constituted the motive and inducement for the offer, would be extending these obligations beyond the scope of any established precedent based upon the doctrine of the common law, and would, I think, be contrary to reason and justice.

The judgment of the court below dismissing the complaint was right, and should be affirmed, with costs.

FINCH, GRAY, and BARTLETT, JJ., concur. PECKHAM, J., dissents. ANDREWS, C. J., not sitting.

Judgment affirmed.

CHAPTER II.

THE INTERSTATE COMMERCE ACT.[1]

INTERSTATE COMMERCE COMMISSION *v.* BALTIMORE & OHIO RAILROAD.

SUPREME COURT OF THE UNITED STATES, 1892.

[145 *U. S.* 263.]

THIS proceeding was originally instituted by the filing of a petition before the Interstate Commerce Commission by the Pittsburg, Cincinnati, & St. Louis Railway Company against the Baltimore & Ohio Railroad Company, to compel the latter to withdraw from its lines of road, upon which business competitive with that of the petitioner was transacted, the so-called "party rates," and to decline to give such rates in future upon such lines of road; also for an order requiring said company to discontinue the practice of selling excursion tickets at less than the regular rate, unless such rates were posted in its offices, as required by law. The petition set forth that the two roads were competitors from Pittsburg westward; that the Baltimore & Ohio road had in operation upon its competing lines of road so-called "party rates," whereby "parties of ten or more persons travelling together on one ticket will be transported over said lines of road between stations located thereon at two cents per mile *per capita*, which is less than the rate for a single person; said rate for a single person being about three cents per mile."[2] . . .

The cause was heard before the commission, which found "that so-called 'party rate' tickets, sold at reduced rates, and entitling a number of persons to travel together on a single ticket or otherwise, are not commutation tickets, within the meaning of section 22 of the act to regulate commerce, and that, when the rates at which such tickets for parties are sold are lower for each member of the party than rates contemporaneously charged for the transportation of single passengers between the same points, they constitute unjust discrimination, and are therefore illegal." It was ordered and adjudged "that the defendant, the Baltimore & Ohio Railroad Company, do forthwith wholly and immediately cease and desist from

[1] Act of Feb. 4, 1887; 24 St. 379; printed in McClain's Cases, App.

[2] Part of the statement of facts is omitted. — ED.

charging rates for the transportation over its lines of a number of persons travelling together in one party which are less for each person than rates contemporaneously charged by said defendant under schedules lawfully in effect for the transportation of single passengers between the same points."

The defendant road having refused to obey this mandate, the commission, on May 1, 1890, pursuant to section 16 of the Interstate Commerce Act, filed this bill in the Circuit Court of the United States for the Southern District of Ohio for a writ of injunction to restrain the defendant from continuing in its violation of the order of the commission. . . .

Mr. Justice BROWN delivered the opinion of the court.

Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the "Interstate Commerce Act" (24 St. 379), railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service; Fitchburg Railroad Co. *v.* Gage, 12 Gray, 393; Baxendale *v.* Eastern Counties Railway Co., 4 C. B. (N. S.) 63; Great Western Railway Co. *v.* Sutton, L. R. 4 H. L. 226, 237; Ex parte Benson, 18 S. C. 38; Johnson *v.* Pensacola Railway Co., 16 Fla. 623; though the weight of authority in this country was in favor of an equality of charge to all persons for similar services. In several of the States acts had been passed with the design of securing the public against unreasonable and unjust discriminations; but the inefficacy of these laws beyond the lines of the State, the impossibility of securing concerted action between the legislatures toward the regulation of traffic between the several States, and the evils which grew up under a policy of unrestricted competition, suggested the necessity of legislation by Congress under its constitutional power to regulate commerce among the several States. These evils ordinarily took the shape of inequality of charges made, or of facilities furnished, and were usually dictated by or tolerated for the promotion of the interests of the officers of the corporation or of the corporation itself, or for the benefit of some favored persons at the expense of others, or of some particular locality or community, or of some local trade or commercial connection, or for the destruction or crippling of some rival or hostile line.

The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit greater

compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It is not all discriminations or preferences that fall within the inhibition of the statute, — only such as are unjust or unreasonable. For instance, it would be obviously unjust to charge A. a greater sum than B. for a single trip from Washington to Pittsburg; but, if A. agrees not only to go, but to return by the same route, it is no injustice to B. to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially similar, as required by section 2 to make an unjust discrimination. Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust. We agree, however, with the plaintiff in its contention that a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination or an unreasonable preference under sections 2 and 3. As was said by Mr. Justice Blackburn in Great Western Railway Co. *v.* Sutton, L. R. 4 H. L. 226, 239: "When it is sought to show that the charge is extortionate, as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

The question involved in this case is whether the principle above stated, as applicable to two individuals, applies to the purchase of a single ticket covering the transportation of 10 or more persons from one place to another. These are technically known as "party rate tickets," and are issued principally to theatrical and operatic companies for the transportation of their troupes. Such ticket is clearly neither a "mileage" nor an "excursion" ticket within the exception of section 22; and upon the testimony in this case it may be doubtful whether it falls within the definition of "commutation tickets," as those words are commonly understood among railway officials. The words "commutation ticket" seem to have no definite meaning. They are defined by Webster (edition of 1891) as "a ticket, as for transportation, which is the evidence of a contract for service at a reduced rate." If this definition be applicable here, then it is clear that it would include a party rate ticket. In the language of the railway, however, they are principally, if not wholly, used to designate tickets for transportation during a limited time between neigh-

boring towns, or cities and suburban towns. The party rate ticket upon the defendant's road is a single ticket, issued to a party of 10 or more, at a fixed rate of 2 cents per mile, or a discount of one third from the regular passenger rate. The reduction is not made by way of a secret rebate or drawback, but the rates are scheduled, posted, and open to the public at large.

But, assuming the weight of evidence in this case to be that the party rate ticket is not a "commutation ticket," as that word was commonly understood at the time of the passage of the act, but is a distinct class by itself, it does not necessarily follow that such tickets are unlawful. The unlawfulness defined by sections 2 and 3 consists either in an "unjust discrimination" or an "undue or unreasonable preference or advantage," and the object of section 22 was to settle, beyond all doubt, that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States, State, or municipal governments; destitute and homeless persons transported free of charge by charitable societies; indigent persons transported at the expense of municipal governments; inmates of soldiers' homes, etc., and ministers of religion, — in favor of whom a reduction of rates had been made for many years before the passage of the act. It may even admit of serious doubt whether, if the mileage, excursion, or commutation tickets had not been mentioned at all in this section, they would have fallen within the prohibition of sections 2 and 3; in other words, whether the allowance of a reduced rate to persons agreeing to travel 1,000 miles, or to go and return by the same road, is a "like and contemporaneous service under substantially similar conditions and circumstances" as is rendered to a person who travels upon an ordinary single trip ticket. If it be so, then, under State laws forbidding unjust discriminations, every such ticket issued between points within the same State must be illegal. In view of the fact, however, that every railway company issues such tickets; that there is no reported case, State or federal, wherein their illegality has been questioned; that there is no such case in England; and that the practice is universally acquiesced in by the public, — it would seem that the issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons travelling upon them.

But, whether these party rate tickets are commutation tickets proper, as known to railway officials, or not, they are obviously

within the commuting principle. As stated in the opinion of Judge Sage in the court below: "The difference between commutation and party rate tickets is that commutation tickets are issued to induce people to travel more frequently, and party rate tickets are issued to induce more people to travel. There is, however, no difference in principle between them, the object in both cases being to increase travel without unjust discrimination, and to secure patronage that would not otherwise be secured."

The testimony indicates that for many years before the passage of the act it was customary for railroads to issue tickets at reduced rates to passengers making frequent trips, — trips for long distances, and trips in parties of 10 or more, lower than the regular single fare charged between the same points; and such lower rates were universally made at the date of the passage of the act. As stated in the answer, to meet the needs of the commercial traveller, the 1,000-mile ticket was issued; to meet the needs of the suburban resident or frequent traveller, several forms of tickets were issued. For example, monthly or quarterly tickets, good for any number of trips within the specified time; and 10, 25, or 50 trip tickets, good for a specified number of trips by one person, or for one trip by a specified number of persons; to accommodate parties of 10 or more, a single ticket, one way or round trip, for the whole party, was made up by the agent on a skeleton form furnished for that purpose; to accommodate excursionists travelling in parties too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were also issued between cities where travel was frequent. In short, it was an established principle of the business that whenever the amount of travel more than made up to the carrier for the reduction of the charge *per capita*, then such reduction was reasonable and just in the interests both of the carrier and of the public. Although the fact that railroads had long been in the habit of issuing these tickets would be by no means conclusive evidence that they were legal, since the main purpose of the act was to put an end to certain abuses which had crept into the management of railroads, yet Congress may be presumed to have had those practices in view, and not to have designed to interfere with them, except so far as they were unreasonable in themselves, or unjust to others. These tickets, then, being within the commutation principle of allowing reduced rates in consideration of increased mileage, the real question is whether this operates as an undue or unreasonable preference or advantage to this particular description of traffic, or an unjust discrimination against others. If, for example, a railway makes to the public, generally, a certain rate of freight, and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors, and may even enable him to obtain a complete

monopoly of that business. Even if the same reduced rate be allowed to every one doing the same amount of business, such discrimination may, if carried too far, operate unjustly upon the smaller dealers engaged in the same business and enable the larger ones to drive them out of the market.

The same result, however, does not follow from the sale of a ticket for a number of passengers at a less rate than for a single passenger; it does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is able, in a particular instance, to travel at a less rate than he. If it operates injuriously towards any one it is the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another. If it be lawful to issue these tickets, then the Pittsburg, Chicago, & St. Louis Railway Company has the same right to issue them that the defendant has, and may compete with it for the same traffic; but it is unsound to argue that it is unlawful to issue them because it has not seen fit to do so. Certainly its construction of the law is not binding upon this court. The evidence shows that the amount of business done by means of these party rate tickets is very large; that theatrical and operatic companies base their calculation of profits to a certain extent upon the reduced rates allowed by railroads; and that the attendance at conventions, political and religious, social and scientific, is, in a great measure, determined by the ability of the delegates to go and come at a reduced charge. If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single trip passenger would gain absolutely nothing. If a case were presented where a railroad refused an application for a party rate ticket upon the ground that it was not intended for the use of the general public, but solely for theatrical troupes, there would be much greater reason for holding that the latter were favored with an undue preference or advantage.

In order to constitute an unjust discrimination under section 2 the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but, in either case, it must be for a "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." To bring the present case within the words of this section, we must assume that the transportation of 10 persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible.

In this connection we quote with approval from the opinion of Judge Jackson in the court below: "To come within the inhibition

of said sections, the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons or classes between whom differences in charges are made must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination."

The English Traffic Act of 1854 contains a clause similar to section 3 of the Interstate Commerce Act, that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

In Hozier *v.* Caledonian Railroad Co., 17 Sess. Cas. (D) 302, 1 Nev. & McN. 27, complaint was made by one who had frequent occasion to travel, that passengers from an intermediate station between Glasgow and Edinburgh were charged much greater rates to those places than were charged to other through passengers between these termini; but the Scotch Court of Session held that the petitioner had not shown any title or interest to maintain the proceeding; his only complaint being that he did not choose that parties travelling from Edinburgh to Glasgow should enjoy the benefit of a cheaper rate of travel than he himself could enjoy. "It provides," said the court, "for giving undue preference to parties *pari passu* in the matter, but you must bring them into competition in order to give them an interest to complain." This is in substance holding that the allowance of a reduced through rate worked no injustice to passengers living on the line of the road, who were obliged to pay at a greater rate. So in Jones *v.* Eastern Counties Railway Co., 3 C. B. (N. S.) 718, the court refused an injunction to compel a railway company to issue season tickets between Colchester and London upon the same terms as they issued them between Harwich and London, upon the mere suggestion that the granting of the latter, the distance being considerably greater, at a much lower rate than the former, was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester. Upon the other hand, in Ransome *v.* Eastern Counties Railway Co., 1 C. B. (N. S.) 437, where it was manifest that a railway company charged Ipswich merchants, who sent from thence coal which had come thither by sea, a higher rate for the carriage of their coal than it charged Peterboro merchants, who had made arrangements with it to carry large quantities over its lines, and that the sums charged the Peterboro merchants were

fixed so as to enable them to compete with the Ipswich merchants, the court granted an injunction, upon the ground of an undue preference to the Peterboro merchants, the object of the discrimination being to benefit the one dealer at the expense of the other, by depriving the latter of the natural advantages of his position. In Oxlade *v.* Northeastern Railway Co., 1 C. B. (N. S.) 454, a railway company was held justified in carrying goods for one person for a less rate than that at which they carried the same description of goods for another, if there be circumstances which render the cost of carrying the goods for the former less than the cost of carrying them for the latter, but that a desire to introduce northern coke into a certain district was not a legitimate ground for making special agreements with different merchants for the carriage of coal and coke at a rate lower than the ordinary charge, there being nothing to show that the pecuniary interests of the company were affected; and that this was an undue preference.

In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. But, so far as relates to the question of "undue preference," it may be presumed that Congress, in adopting the language of the English act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute. McDonald *v.* Hovey, 110 U. S. 619.

There is nothing in the objection that party rate tickets afford facilities for speculation, and that they would be used by ticket brokers or "scalpers" for the purpose of evading the law. The party rate ticket, as it appears in this case, is a single ticket covering the transportation of 10 or more persons, and would be much less available in the hands of a ticket broker than an ordinary single ticket, since it could only be disposed of to a person who would be willing to pay two thirds of the regular fare for that number of people. It is possible to conceive that party rate tickets may, by a reduction of the number for whom they may be issued, be made the pretext for evading the law, and for the purpose of cutting rates; but should such be the case, the courts would have no difficulty in discovering the purpose for which they were issued, and applying the proper remedy.

Upon the whole, we are of the opinion that party rate tickets, as used by the defendant, are not open to the objections found by the Interstate Commerce Commission, and are not in violation of the act to regulate commerce, and the decree of the court below is therefore

Affirmed.

ILWACO RAILWAY & NAVIGATION COMPANY v. OREGON SHORT LINE & UTAH NORTHERN RAILWAY.

CIRCUIT COURT OF APPEALS, NINTH CIRCUIT, 1893.

[57 *Fed.* 673.]

McKENNA, Circuit Judge.[1] The plaintiff contends that defendant, by preventing it from landing its boats at a wharf owned and used by defendant, discriminates against it, contrary to section 3 of the Interstate Commerce Act.

The facts are as follows: —

That prior to the month of August, 1888, the defendant was named the Ilwaco Steam Navigation Company, but in that month it filed supplemental articles of incorporation, changing its name to Ilwaco Railway & Navigation Company, and proceeded to construct a line of railway from a point at or near the town of Ilwaco on the Pacific Ocean, in the State of Washington, to a point on the navigable waters of Shoal Water Bay, in Pacific County. That the construction of said railway was commenced before, but completed after, the filing of said supplemental articles. That prior to the construction of said railroad line the defendant owned and operated a line of steamboats between the town of Astoria, Or., and the town of Ilwaco. That the shores of the Pacific Ocean in that vicinity were popular summer resorts during the months of July and August and the first week of September. That prior to 1888 the Oregon Railway & Navigation Company owned the boats and line between Astoria and Portland, Or., which plaintiff now owns, and carried passengers from Portland to Astoria, which were then transferred to plaintiff's boats, and carried to Ilwaco, from whence they went to the ocean beach in wagons. That in the summer season of the years 1888, 1889, 1890, and 1891 the Oregon Railway & Navigation Company asked and obtained permission to land its passengers on the wharf at Ilwaco, paying a compensation therefor. That complainant only ran its boats during said summer months, and only while people were travelling to said summer resorts. Said town of Portland, Or., is situated on the Willamette River, about 100 miles inland, easterly from the said city of Astoria, which latter city is situated on the left bank of the Columbia River, and about 12 miles inland from the ocean; and the town of Ilwaco is situated on the right bank of the Columbia River, at a part thereof known as "Baker's Bay," and about 15 miles distant, in a northwesterly direction, from said city of Astoria. That in the year 1892 complainant desired the same privileges, but respondent refused. . . .

The defendant company was organized for the purpose of constructing a transportation route from Astoria, Or., to Shoal Water Bay,

[1] Part of the opinion is omitted. — ED.

Wash. Its means of transportation are steamboats and a railroad. The wharf at Ilwaco makes the connection between them, and the continuity of the route. The act contemplates, we think, independent carriers, capable of mutual relations, and capable of being objects of favor or prejudice. There must be at least two other carriers besides the offending one. For a carrier to prefer itself in its own proper business is not the discrimination which is condemned.

We do not think that the cases cited by appellee militate with these views, nor do they justify a railroad company combining with its proper business a business not cognate to it, and discriminating in favor of itself, as it might in counsel's illustration of a combination of a railroad company with the Standard Oil Company, or as illustrated in the cases of Baxendale *v.* Great Western Ry. Co., 1 Railway & Canal Traffic Cas. 202; Same *v.* London & S. W. Ry. Co., Id. 231; and Parkinson *v.* Railway Co., Id. 280. In all these cases the railroad company attempted to discriminate in favor of itself as carrier, separate from its capacity as a railway carrier. We find no difficulty of concurring in these cases, and distinguishing them from the case at bar. It was not to engage in the business of drayman, as Cockburn, C. J., indicates in the first case, that great powers have been given to railway companies, and, if permitted to be so used, might indeed be converted into a means of very grievous oppression. The principle of these cases does not extend to boats owned by railroads, as a part of a continuous line. Nor do we think the case, Indian River Steamboat Co. *v.* East Coast Transp. Co. (Fla.), 10 South. Rep. 480, sustains complainant. It was a case of discrimination. The action was between two competing steamboat companies, in favor of one of which a railroad company had discriminated by leasing its wharf. Both companies were independent of the railroad, and both connecting lines with it. But the court recognized the right of the railroad company and the Indian River Company to build and maintain a wharf, as incidental to their business, saying: "If either company should erect a dock or wharf for its private use, we know of no law to prohibit it." Page 492. The steamboats were competing lines, and the statutes of Florida regulating railroads provided that no common carriers subject to the provisions should "make any unjust discrimination in the receiving of freight from or the delivery of freight to any competing lines of steamboats in this State." The decision, therefore, was sustained by the laws of the State. The reasoning of the court, beyond this, seems to be in conflict with the Express Cases decided by the Supreme Court of the United States. 117 U. S. 29.

It is not clear what complainant claims from the second subdivision of section 3, besides what it claims from the first subdivision. The second subdivision is as follows: —

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper,

and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The contention of complainant is not that defendant's facilities are inadequate, but that it is excluded from them. The exclusion, however, only consists in the prevention of the landing of its boats at defendant's wharf. We have probably said enough to indicate our views of this, but we may add that the wharf does not seem to be a public station. It is a convenience, only, in connecting its railroads and boats; the general station being at Ilwaco, where ample facilities exist.

Judgment reversed, and cause remanded for further proceedings.

LITTLE ROCK & MEMPHIS RAILROAD *v.* ST. LOUIS SOUTHWESTERN RAILWAY.

CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, 1894.

[63 *Fed.* 775.]

THAYER, Circuit Judge, delivered the opinion of the court.

It will be observed that the sole question in the cases filed against the St. Louis, Iron Mountain, & Southern Railway Company concerns the right of that company to require the prepayment of freight charges on all property tendered to it for transportation at Little Rock by the Little Rock & Memphis Railroad Company, while it pursues a different practice with respect to freight received from other shippers at that station. At common law a railroad corporation has an undoubted right to require the prepayment of freight charges by all its customers, or some of them, as it may think best. It has the same right as any other individual or corporation to exact payment for a service before it is rendered, or to extend credit. Oregon Short Line & U. N. Ry. Co. *v.* Northern Pac. R. Co., 51 Fed. 465, 472. Usually, no doubt, railroad companies find it to their interest, and most convenient, to collect charges from the consignee; but we cannot doubt their right to demand a reasonable compensation in advance for a proposed service, if they see fit to demand it. This common law right of requiring payment in advance of some customers, and of extending credit to others, has not been taken away by the Interstate Commerce Law, unless it is taken away indirectly by the inhibition contained in the third section of the act, which declares that an interstate carrier shall not "subject any particular person,

company, corporation, or locality . . . to any undue or unreasonable . . . disadvantage in any respect whatever." This prohibition is very broad, it is true, but it is materially qualified and restricted by the words "undue or unreasonable." One person or corporation may be lawfully subjected to some disadvantage in comparison with others, provided it is not an undue or unreasonable disadvantage. In view of the fact that all persons and corporations are entitled at common law to determine for themselves, and on considerations that are satisfactory to themselves, for whom they will render services on credit, we are not prepared to hold that an interstate carrier subjects another carrier to an unreasonable or undue disadvantage because it exacts of that carrier the prepayment of freight on all property received from it at a given station, while it does not require charges to be paid in advance on freight received from other individuals and corporations at such station. So far as we are aware, no complaint had been made of abuses of this character at the time the Interstate Commerce Law was enacted, and it may be inferred that the particular wrong complained of was not within the special contemplation of Congress. This being so, the general words of the statute ought not to be given a scope which will deprive the defendant company of an undoubted common law right, which all other individuals and corporations are still privileged to exercise, and ordinarily do exercise. It is most probable that self-interest — the natural desire of all carriers to secure as much patronage as possible — will prevent this species of discrimination from becoming a public grievance so far as individual shippers are concerned; and it is desirable that the courts should interfere as little as possible with those business rivalries existing between railroad corporations themselves, which are not productive of any serious inconvenience to shippers. We think, therefore, that no error was committed in entering the judgment and decree in favor of the St. Louis, Iron Mountain, & Southern Railway Company.

The complaint preferred against the other companies, to wit, the St. Louis Southwestern and the Little Rock & Ft. Smith Railway Companies, is somewhat different. It consists in the alleged refusal of those companies, — first, to honor through tickets and through bills of lading issued by the complainant company, or to enter into arrangements with it for through billing or through rating; and, secondly, in the alleged refusal of these companies to accept loaded cars coming from the Little Rock & Memphis Railroad, and in their action in requiring freight to be rebilled and reloaded at the two connecting points, to wit, Brinkley and Little Rock.

Before discussing the precise issue which arises upon this record it will be well to restate one or two propositions that are supported by high authority as well as persuasive reasons, and which do not seem to be seriously controverted even by the complainant's counsel. In the first place, the interstate commerce law does not require an interstate carrier to treat all other connecting carriers in precisely the

same manner, without reference to its own interests. Some play is given by the act to self-interest. The inhibitions of the third section of the law, against giving preferences or advantages, are aimed at those which are "undue or unreasonable"; and even that clause which requires carriers "to afford all reasonable, proper, and equal facilities for the interchange of traffic" does not require that such "equal facilities" shall be afforded under dissimilar circumstances and conditions. Moreover, the direction "to afford equal facilities for an interchange of traffic" is controlled and limited by the proviso that this clause "shall not be construed as requiring a carrier to give the use of its tracks or terminal facilities to another carrier." Kentucky & I. Bridge Co. *v.* Louisville & N. R. Co., 37 Fed. 571; Oregon Short Line & U. N. Ry. Co. *v.* Northern Pac. R. Co., 51 Fed. 465, 473. In the second place, it has been held that neither by the common law nor by the interstate commerce law have the national courts been vested with jurisdiction to compel interstate carriers to enter into arrangements or agreements with each other for the through billing of freight, and for joint through rates. Agreements of this nature, it is said, under existing laws, depend upon the voluntary action of the parties, and cannot be enforced by judicial proceedings without additional legislation. Little Rock & M. R. Co. *v.* East Tennessee, V. & G. R. Co., 3 Interst. Commerce Com. R. 1, 16, 17; Little Rock & M. R. Co. *v.* St. Louis, I. M. & S. Ry. Co., 41 Fed. 559, and cases there cited by Judge Caldwell. Furthermore, it has been ruled by Mr. Justice Field in the case of the Oregon Short Line & U. N. Ry. Co. *v.* Northern Pac. R. Co., 51 Fed. 465, 474, that the third section of the Interstate Commerce Act does not require an interstate carrier to receive freight in the cars in which it is tendered by a connecting carrier, and to transport it in such cars, paying a mileage rate thereon, when it has cars of its own that are available for the service, and the freight will not be injured by transfer. It should be remarked in this connection that the bills on file in the present cases, as well as the petitions in the law cases, fail to disclose whether the offending companies have refused to receive freight in the cars in which it was tendered to them, even when it would injure the freight to transfer it, or when they had no cars of their own that were immediately available to forward it to its destination. Neither do the bills or the petitions disclose whether, in tendering freight in cars to be forwarded, the complainant company demanded the payment of the usual wheelage on the cars, or tendered the use of the same free, for the purpose of forwarding the freight to its destination. The allegations of a refusal to receive freight in cars are exceedingly general, and convey no information on either of the points last mentioned.

As we have before remarked, the several propositions above stated do not seem to be seriously questioned. It is urged, however, in substance, that although the court may be powerless to make and

enforce agreements between carriers for through billing and through rating, and for the use of each other's cars, tracks, and terminal facilities, yet that when a carrier, of its own volition, enters into an agreement of that nature with another connecting carrier, the law commands it to extend "equal facilities" to all other connecting carriers, if the physical connection is made at or about the same place, and the physical facilities for an interchange of traffic are the same, and that this latter duty the courts may and should enforce. It will be observed that the proposition contended for, if sound, will enable the courts to do indirectly what it is conceded they cannot do directly. It authorizes them to put in force between two carriers an arrangement for an interchange of traffic that may be of great financial importance to both, which could neither be established nor enforced by judicial decree, except for the fact that one of the parties had previously seen fit to make a similar arrangement with some other connecting carrier. It may be, also, that the arrangement thus forced upon the carrier would be one in which the public at large have no particular concern, because the equal facilities demanded by the complainant carrier would be of no material advantage to the general public, and would only be a benefit to the complainant.

Another necessary result of the doctrine contended for is that it deprives railway carriers, in a great measure, of the management and control of their own property, by destroying their right to determine for themselves what contracts and traffic arrangements with connecting carriers are desirable and what are undesirable. There ought to be a clear authority found in the statute for depriving a carrier of this important right before the authority is exercised, for, when questions of that nature have to be solved, a great variety of complex considerations will present themselves, some of which can neither be foreseen nor stated. A railroad having equal facilities at a given point for forming a physical connection with a number of connecting carriers might find it exceedingly beneficial to enter into an arrangement with one of them, having a long line and important connections, for through billing and rating, and for the use of each other's cars and terminal facilities, while it would find it exceedingly undesirable and unprofitable to enter into a similar arrangement with a shorter road, which could offer nothing in return. Or the case might be exactly the reverse. The shorter, and at the time the less important road, might be able to present sound business reasons which would make an arrangement with it, of the kind above indicated, more desirable than with the longer line. Furthermore, if it be the law that an arrangement for through billing and rating with one carrier necessitates a like arrangement with others, this might be a controlling influence in determining a railway company to refuse to enter into such an arrangement with any connecting carrier. In view of these considerations, we are unable to adopt a construction of the Interstate Commerce Act which will practically compel a car-

rier, when it enters into an arrangement with one carrier for through billing and rating and for the use of its tracks and terminals, to make the same arrangement with all other connecting carriers, if the physical facilities for an interchange of traffic are the same, and to do this without reference to the question whether the enforced arrangement is or is not of any material advantage to the public.

In two of the cases heretofore cited (Kentucky & I. Bridge Co. *v.* Louisville & N. R. Co., and Oregon Short Line & U. N. Ry. Co. *v.* Northern Pac. R. Co.), it was held that the charge of undue or unreasonable discrimination cannot be predicated on the fact that a railroad company allows one connecting carrier to make a certain use of its tracks or terminals, which it does not concede to another. This conclusion was reached as the necessary result of the final clause of the third section of the Interstate Commerce Law, above quoted, to the effect that the second paragraph of the third section shall not be so construed as to require a carrier to give the use of its tracks or terminals to another company. Railroads are thus left by the commerce act to exercise practically as full control over their tracks and terminals with reference to other carriers as they exercised at common law. The language of Mr. Justice Field in that behalf was as follows: —

"It follows from this . . . that a common carrier is left free to enter into arrangements for the use of its tracks or terminal facilities, with one or more connecting lines, without subjecting itself to the charge of giving undue or unreasonable preferences or advantages to such lines, or of unlawfully discriminating against other carriers. In making arrangements for such use by other companies, a common carrier will be governed by considerations of what is best for its own interests. The act does not purport to divest the railway carrier of its exclusive right to control its own affairs, except in the specific particulars indicated." 51 Fed. 474, 475.

Furthermore, it is the settled construction of the act, as we have before remarked, that it does not make it obligatory upon connecting carriers to enter into traffic arrangements for through billing and rating either as to passenger or freight traffic. This conclusion has been reached by all of the tribunals who have had occasion to consider the subject, and it is based on the fact that, in enacting the commerce act, Congress did not see fit to adopt that provision of the English Railway and Canal Traffic Act, passed in 1873, which expressly empowered the English commissioners to compel connecting carriers to put in force arrangements for through billing and through rating when they deemed it to the interest of the public that such arrangements should be made. Little Rock & M. R. Co. *v.* East Tennessee, V. & G. R. Co., 3 Interst. Commerce Com. R., 1, 9, 10; Kentucky & I. Bridge Co. *v.* Louisville & N. R. Co., 37 Fed. 567, 630, 631. See also the second annual report of the Interstate Commerce Commission (2 Interst. Commerce Com. R., 510, 511). In the

light of these adjudications, we are compelled to conclude that, if the charge of an unreasonable discrimination cannot be successfully predicated on the ground that a railway company makes an arrangement with one connecting carrier for the use of its tracks and terminals, which it refuses to make with another although the physical facilities for an interchange of traffic are the same, then the charge of discrimination cannot be predicated on the ground that it makes an arrangement for through billing and rating with one carrier, and does not make it with another. The Interstate Commerce Act does not, it seems, at present, make it obligatory on carriers to make arrangements of either sort, and does not give the commission power to compel such arrangements, but leaves connecting carriers, as at common law, to determine for themselves when such arrangements are desirable, and when undesirable. Moreover, arrangements for through billing and rating will, as a general rule, necessarily involve an agreement for the use, to some extent, of each other's terminals and tracks; and, by the express language of the statute, such use cannot be enforced without the consent of the owner. We are unwilling, therefore, as the law now stands, to compel the defendant companies to afford the facilities which the complainant demands. As was said by Mr. Justice Jackson, then Circuit Judge, in the case to which we have already referred: —

"The law should be as liberally construed in favor of commerce among the States as its language will permit; but, when complaint is made or relief is sought solely or mainly in the interest of the common carriers engaged in the transportation of such commerce, the act complained of or the right asserted should not rest upon any doubtful construction, but should clearly appear to have been forbidden or conferred."

We are also forced to conclude that if the public interest requires that interstate carriers shall be compelled to put in force arrangements for through billing and rating, and for the establishment of joint through lines, the statute should be made more explicit, and that the commission should be empowered to prescribe the terms of such arrangements upon a comprehensive view of the circumstances of each particular case.

Some allusion was made in the argument to a provision found in the constitution of the State of Arkansas (article 17, § 1), as having some bearing on the questions discussed in these cases; but as the bills and petitions filed are plainly founded on the Interstate Commerce Law, and thus involve a federal question arising under that act, and as there is no jurisdiction arising from diverse citizenship, we have not felt called upon to consider or decide the proposition founded upon the constitution of the State. In view of what has been said, the several decrees and judgments are hereby affirmed.

CINCINNATI, NEW ORLEANS, & TEXAS PACIFIC RAILWAY *v.* INTERSTATE COMMERCE COMMISSION.

SUPREME COURT OF THE UNITED STATES, 1896.

[162 *U. S.* 184.]

MR. JUSTICE SHIRAS delivered the opinion of the court.

The investigation before the Interstate Commerce Commission resulted in an order in the following terms: —

"It is ordered and adjudged that the defendants, the Cincinnati, New Orleans, & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company do, upon and after the 20th day of July, 1891, wholly cease and desist from charging or receiving any greater compensation, in the aggregate, for the transportation in less than car loads of buggies, carriages, and other articles classified by them as freight of first class, for the shorter distance over the line formed by their several railroads from Cincinnati, in the State of Ohio, to Social Circle, in the State of Georgia, than they charge or receive for the transportation of said articles in less than car loads for the longer distance over the same line from Cincinnati aforesaid to Augusta, in the State of Georgia, and that the said defendants, the Cincinnati, New Orleans, & Texas Pacific Railway Company, do also, from and after the 20th day of July, 1891, wholly cease and desist from charging or receiving any greater aggregate compensation for the transportation of buggies, carriages, and other first-class articles, in less than car loads, from Cincinnati aforesaid to Atlanta, in the State of Georgia, than one dollar per hundred pounds."

The decree of the Circuit Court of Appeals, omitting unimportant details, was as follows: —

"It is ordered, adjudged, and decreed . . . that this cause be remanded to the Circuit Court, with instructions to enter a decree in favor of the complainant, the Interstate Commerce Commission, and against the defendants, the Cincinnati, New Orleans, & Texas Pacific Railway Company, the Western & Atlantic Railroad Company, and the Georgia Railroad Company, commanding and restraining the said defendants, their officers, servants, and attorneys, to cease and desist from making any greater charge, in the aggregate, on buggies, carriages, and on all other freight of the first class carried in less than car loads from Cincinnati to Social Circle, than they charge on such freight from Cincinnati to Augusta; that they so desist and refrain within five days after the entry of the decree; and in case they, or any of them, shall fail to obey said order, condemning the said defendants, and each of them, to pay one hundred dollars a day for every day thereafter they shall so fail; and denying the relief prayed for in relation to charges on like freight from Cincinnati to Atlanta."

It will be observed that in its said decree the Circuit Court of Appeals adopted that portion of the order of the commission which commanded the defendants to make no greater charge on freight carried to Social Circle than on like freight carried to Augusta, and disapproved and annulled that portion which commanded the Cincinnati, New Orleans, & Texas Pacific Railway Company and the Western & Atlantic Railroad Company to desist from charging for the transportation of freight of like character from Cincinnati to Atlanta more than $1 per 100 pounds.

The railroad companies, in their appeal, complain of the decree of the Circuit Court of Appeals in so far as it affirmed that portion of the order of the commission which affected the rates charged to Social Circle. The commission, in its appeal, complains of the decree, in that it denies the relief prayed for in relation to charges on freight from Cincinnati to Atlanta.

The first question that we have to consider is whether the defendants, in transporting property from Cincinnati to Social Circle, are engaged in such transportation "under a common control, management, or arrangement for a continuous carriage or shipment," within the meaning of that language, as used in the act to regulate commerce.

We do not understand the defendants to contend that the arrangement whereby they carry commodities from Cincinnati to Atlanta and to Augusta at through rates which differ in the aggregate from the aggregate of the local rates between the same points, and which through rates are apportioned between them in such a way that each receives a less sum than their respective local rates, does not bring them within the provisions of the statute. What they do claim is that, as the charge to Social Circle, being $1.37 per hundred pounds, is made up of a joint rate between Cincinnati and Atlanta, amounting to $1.07 per hundred pounds, and 30 cents between Atlanta and Social Circle, and as the $1.07 for carrying the goods to Atlanta is divided between the Cincinnati, New Orleans, and Texas Pacific and the Western and Atlantic, $75\frac{1}{10}$ cents to the former and $31\frac{1}{10}$ cents to the latter, and the remaining 30 cents, being the amount of the regular local rate, goes to the Georgia company, such a method of carrying freight from Cincinnati to Social Circle and of apportioning the money earned, is not a transportation of property between those points "under a common control, management, or arrangement for a continuous carriage or shipment."

Put in another way, the argument is that, as the Georgia Railroad Company is a corporation of the State of Georgia, and as its road lies wholly within that State, and as it exacts and receives its regular local rate for the transportation to Social Circle, such company is not, as to freight so carried, within the scope of the act of Congress.

It is, no doubt, true that, under the very terms of the act, its provisions do not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly

within one State, not shipped to or from a foreign country from or to any State or Territory.

In the answer filed by the so-called "Georgia Railroad Company" in the proceedings before the commission, there was the following allegation: "This respondent says that while no arrangement exists for a through bill of lading from Cincinnati to Social Circle, as a matter of fact the shipment from Cincinnati to Social Circle by the petitioner was made on a through bill of lading, the rate of which was fixed by adding this respondent's local rate from Atlanta to Social Circle to the through rate from Cincinnati to Atlanta."

The answer of the Louisville & Nashville Railroad Company and Central Railroad & Banking Company of Georgia, which companies, as operating the Georgia railroads, were sued by the name of the "Georgia Railroad Company," in the Circuit Court of the United States, contained the following statement:—

"So far as these respondents are concerned, they will state that on July 3, 1891, E. R. Dorsey, general freight agent of said Georgia Railroad Company, issued a circular to its connections, earnestly requesting them that thereafter, in issuing bills of lading to local stations on the Georgia Railroad, no rates be inserted east of Atlanta, except to Athens, Gainesville, Washington, Milledgeville, Augusta, or points beyond. Neither before nor since the date of said circular have these respondents, operating said Georgia Railroad, been in any way parties to such through rates, if any, as may have been quoted, from Cincinnati or other Western points to any of the strictly local stations on said Georgia Railroad. The stations excepted in said circular are not strictly local stations. Both before and since the date of said circular respondents have received at Atlanta east-bound freight destined to strictly local stations on the Georgia Railroad, and have charged full local rates to such stations, said rates being such as they were authorized to charge by the Georgia Railroad commission. Said rates are reasonably low, and are charged to all persons alike, without discrimination."

Upon this part of the case the conclusion of the Circuit Court was that the traffic from Cincinnati to Social Circle, in issue as to the Georgia Railroad Company, was local, and that that company was not, on the facts presented, made a party to a joint or common arrangement such as make the traffic to Social Circle subject to the control of the Interstate Commerce Commission.

We are unable to accept this conclusion. It may be true that the Georgia Railroad Company, as a corporation of the State of Georgia, and whose entire road is within that State, may not be legally compelled to submit itself to the provisions of the act of Congress, even when carrying, between points in Georgia, freight that has been brought from another State. It may be that if, in the present case, the goods of the James & Mayer Buggy Company had reached Atlanta, and there and then, for the first time, and independently of

any existing arrangement with the railroad companies that had transported them thither, the Georgia Railroad Company was asked to transport them, whether to Augusta or to Social Circle, that company could undertake such transportation free from the control of any supervision except that of the State of Georgia. But when the Georgia Railroad Company enters into the carriage of foreign freight, by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one State to another, and thus becomes amenable to the federal act, in respect to such interstate commerce. We do not perceive that the Georgia Railroad Company escaped from the supervision of the commission by requesting the foreign companies not to name or fix any rates for that part of the transportation which took place in the State of Georgia when the goods were shipped to local points on its road. It still left its arrangement to stand with respect to its terminus at Augusta and to other designated points. Having elected to enter into the carriage of interstate freights, and thus subjected itself to the control of the commission, it would not be competent for the company to limit that control, in respect to foreign traffic, to certain points on its road, and exclude other points.

The Circuit Court sought to fortify its position in this regard by citing the opinion of Mr. Justice Brewer in the case of Chicago & Northwestern Railroad *v.* Osborne, 10 U. S. App. 430, when that case was before the United States Circuit Court of Appeals for the Eighth Circuit. It is quite true that the opinion was expressed that a railroad company incorporated by and doing business wholly within one State cannot be compelled to agree to a common control, management, or arrangement with connecting companies, and thus be deprived of its rights and powers as to rates on its own road. It was also said that it did not follow that, even if such a State corporation did agree to form a continuous line for carrying foreign freight at a through rate, it was thereby prevented from charging its ordinary local rates for domestic traffic originating within the State.

Thus understood, there is nothing in that case which we need disagree with, in disapproving the Circuit Court's view in the present case. All we wish to be understood to hold is that when goods are shipped under a through bill of lading from a point in one State to a point in another, are received in transit by a State common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment, within the meaning of the act to regulate commerce. When we speak of a "through bill of lading," we are referring to the usual method in use by connecting companies, and must

not be understood to imply that a common control, management, or arrangement might not be otherwise manifested.

Subject, then, as we hold the Georgia Railroad Company is, under the facts found, to the provisions of the act to regulate commerce, in respect to its interstate freight, it follows, as we think, that it was within the jurisdiction of the commission to consider whether the said company, in charging a higher rate for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, was or was not transporting property, in transit between States, under "substantially similar circumstances and conditions."

We do not say that under no circumstances and conditions would it be lawful, when engaged in the transportation of foreign freight, for a carrier to charge more for a shorter than a longer distance on its own line; but it is for the tribunal appointed to enforce the provisions of the statute, whether the commission or the court, to consider whether the existing circumstances and conditions were or were not substantially similar.

It has been forcibly argued that in the present case the commission did not give due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged. But the question was one of fact, peculiarly within the province of the commission, whose conclusions have been accepted and approved by the Circuit Court of Appeals, and we find nothing in the record to make it our duty to draw a different conclusion.

We understand the record as disclosing that the commission, in view of the circumstances and conditions in which the defendants were operating, did not disturb the rates agreed upon, whereby the same charge was made to Augusta as to Atlanta, — a less distant point. Some observations made by the commission, in its report, on the nature of the circumstances and conditions which would justify a greater charge for the shorter distance, gave occasion for an interesting discussion by the respective counsel. But it is not necessary for us, in the present case, to express any opinion on a subject so full of difficulty.

These views lead to an affirmance of the decree of the Circuit Court of Appeals, in so far as the appeal of the defendant companies is concerned, and we are brought to a consideration of the appeal by the Interstate Commerce Commission.

That appeal presents the question whether the Circuit Court of Appeals erred in its holding in respect to the action of the Interstate Commerce Commission, in fixing a maximum rate of charges for the transportation of freight of the first class in less than car loads from Cincinnati to Atlanta.

This question may be regarded as twofold, and is so presented in the assignment of error filed on behalf of the commission, namely: Did the court err in not holding that in point of law the Interstate

Commerce Commission had power to fix a maximum rate? and, if such power existed, did the court err in not holding that the evidence justified the rate fixed by the commission, and not decreeing accordingly?

It is stated by the commission, in its report, that "the only testimony offered or heard as to the reasonableness of the rate to Atlanta in question was that of the Vice-President of the Cincinnati, New Orleans, & Texas Pacific Company, whose deposition was taken at the instance of the company." And in acting upon the subject the commission say: —

"This statement or estimate of the rate from Cincinnati to Atlanta ($1.01 per hundred pounds in less than car loads), we believe, is fully as high as it may reasonably be, if not higher than it should be; but, without more thorough investigation than it is now practicable to make, we do not feel justified in determining upon a more moderate rate than $1 per hundred pounds of first-class freight in less than car loads. The rate on this freight from Cincinnati to Birmingham, Alabama, is 89 cents, as compared with $1.07 to Atlanta, the distances being substantially the same. There is apparently nothing in the nature and character of the service to justify such difference, or in fact to warrant any substantial variance in the Atlanta and Birmingham rate from Cincinnati."

But when the commission filed its petition in the Circuit Court of the United States, seeking to enforce compliance with the rate of $1 per 100 pounds, as fixed by the commission, the railroad companies, in their answers, alleged that "the rate charged to Atlanta, namely, $1.07 per hundred pounds, was fixed by active competition between various transportation lines, and was reasonably low."

Under this issue evidence was taken, and we learn from the opinion of the Circuit Court that, as to the rate to Birmingham, there was evidence before the court which evidently was not before the commission, namely, that the rate from Cincinnati to Birmingham, which seems previously to have been $1.08, was forced down to 89 cents by the building of the Kansas City, Memphis, & Birmingham Railroad, which new road caused the establishment of a rate of 75 cents from Memphis to Birmingham, and, by reason of water route to the Northwest, such competition was brought about that the present rate of 89 cents from Cincinnati to Birmingham was the result.

Without stating the reasoning of the Circuit Court, which will be found in the report of the case in 64 Fed. 981, the conclusion reached was that the evidence offered in that court was sufficient to overcome any *prima facie* case that may have been made by the findings of the commission, and that the rate complained of was not unreasonable.

As already stated, the Circuit Court of Appeals adopted the views of the Circuit Court in respect to the reasonableness of the rate charged on first-class freight carried on defendants' line from Cincinnati to Atlanta; and, as both courts found the existing rate to

have been reasonable, we do not feel disposed to review their finding on that matter of fact.

We think this a proper occasion to express disapproval of such a method of procedure on the part of the railroad companies as should lead them to withhold the larger part of their evidence from the commission, and first adduce it in the Circuit Court. The commission is an administrative board, and the courts are only to be resorted to when the commission prefers to enforce the provisions of the statute by a direct proceeding in the court, or when the orders of the commission have been disregarded. The theory of the act evidently is, as shown by the provision, that the findings of the commission shall be regarded as *prima facie* evidence, that the facts of the case are to be disclosed before the commission. We do not mean, of course, that either party, in a trial in the court, is to be restricted to the evidence that was before the commission, but that the purposes of the act call for a full inquiry by the commission into all the circumstances and conditions pertinent to the questions involved.

Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates was mooted in the courts below, and is discussed in the briefs of counsel.

We do not find any provision of the act that expressly, or by necessary implication, confers such a power.

It is argued on behalf of the commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate, in a given case, depends on the facts, and the function of the commission is to consider these facts and give them their proper weight. If the commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the commission to be reasonable.

We prefer to adopt the view expressed by the late Justice Jackson, when Circuit Judge, in the case of Interstate Commerce Commission *v.* Baltimore & Ohio Railroad Co., 43 Fed. 37, and whose judgment was affirmed by this court, 145 U. S. 263: —

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, — free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

The decree of the Circuit Court of Appeals is affirmed.

TEXAS & PACIFIC RAILWAY v. INTERSTATE COMMERCE COMMISSION.

SUPREME COURT OF THE UNITED STATES, 1896.

[162 *U. S.* 197.]

THE object of the bill was to compel the defendant company to obey an order of the Interstate Commerce Commission.[1] . . .

It appears by the bill that, on March 23, 1889, the commission, of its own motion and without a hearing of the parties to be affected, had made a certain order wherein, among other things, it was provided as follows: —

"Imported traffic transported to any place in the United States from a port of entry or place of reception, whether in this country or in an adjacent foreign country, is required to be taken on the inland tariff governing other freights." 2 Interst. Commerce Com. R. 658.

Subsequently complaint was made to the Interstate Commerce Commission, in a petition filed by the New York Board of Trade and Transportation, that certain railroad companies were disregarding said order, . . . among them the Texas & Pacific Railway Company, the defendant in the present case. . . .

The answer of the Texas & Pacific Railway Company, admitting that, both before and since March 23, 1889, it had carried imported traffic at lower rates than it contemporaneously charged for like traffic originating in the United States, justified by claiming that through shipments from a foreign country to the interior of the United States differ in circumstances and conditions from shipments originating at the American seaboard bound for the same interior points, and that defendant company has a legal right to accept for its share of the through rate a lower sum than it receives for domestic shipment to the same destination from the point at which the imported traffic enters this country.

The result of the hearing before the Interstate Commerce Commission was, so far as the present case is concerned, that the commission held that the Texas & Pacific Railway Company was not justified in accepting, as its share of a through rate on imported traffic, a less charge or sum than it charged and received for inland traffic between the port of reception and the point of delivery, and the said order of January 29, 1891, commanding that said company desist from distinguishing in its charges between foreign and inland traffic, was made. 4 Interst. Commerce Com. R. 447.

As the Texas & Pacific Railway Company declined to observe said order, the commission filed its present bill against said company in the Circuit Court of the United States for the Southern District of New York.

[1] The statement of facts is much condensed, and part of the opinion is omitted. — ED.

MR. JUSTICE SHIRAS delivered the opinion of the court.

The answer of the Texas & Pacific Railway Company to the petition of the New York Board of Trade and Transportation before the Interstate Commerce Commission, and the answer of said company to the petition of the commission filed in the Circuit Court, allege: That rates for the transportation of commodities from Liverpool and London, England, to San Francisco, Cal., are in effect fixed and controlled by the competition of sailing vessels for the entire distance; by steamships and sailing vessels in connection with railroads across the Isthmus of Panama; by steamships and sailing vessels from Europe to New Orleans, connecting these, under through arrangements with the Southern Pacific Company, to San Francisco. That, unless the defendant company charges substantially the rates specified in its answer, it would be prevented, by reason of the competition aforesaid, from engaging in the carrying and transportation of property and import traffic from Liverpool and London to San Francisco, and would lose the revenue derived by it therefrom, which is considerable, and important and valuable to said company. That the rates charged by it are not to the prejudice or disadvantage of New Orleans, and work no injury to that community, because, if said company is prevented from participating in said traffic, such traffic would move via the other routes and lines aforesaid without benefit to New Orleans, but, on the contrary, to its disadvantage. That the foreign or import traffic is upon orders by persons, firms, and corporations in San Francisco and vicinity, buying direct of first hands in London, Liverpool, and other European markets; and, if the order of the commission should be carried into effect, it would not result in discontinuance of that practice or in inducing them to buy in New Orleans in any event. That the result of the order would be to injuriously affect the defendant company in the carriage of articles of foreign imports to Memphis, St. Louis, Kansas City, and other Missouri River points. That by such order the defendant company would be prevented from competing for freight to important points in the State of Texas with the railroad system of that State, having Galveston as a receiving port, and which railroad system is not subject to the control of the Interstate Commerce Commission. These allegations of the answer were not traversed or denied by the commission, but are confirmed by the findings of the commission attached as an exhibit to the petition in the case; and by said findings it further appears that the proportion the Texas & Pacific Railway receives of the through rate is remunerative; that the preponderance of its empty cars go north during eight months of the year, and if something can be obtained to load, it is that much found, and anything is regarded as remunerative that can be obtained to put in its cars to pay mileage; that the competition which controls the making of rates to the Pacific coast is steamship by way of the Isthmus and in cheap heavy goods around Cape Horn; that

the competition to interior points, such as Missouri River points and Denver, is from the trunk lines direct from the Atlantic seaboard; that the ships engaged in carrying to San Francisco around Cape Horn are almost wholly British bottoms; that the through bill of lading furnishes a collateral for the transaction of business, takes from the shipper and consignee both the care as to intermediate charges, elevators, wharves, and cost of handling, and puts it on the carrier, reduces the intermediate charges, very much facilitates the transaction of business, and helps to swell its volume; that the tendency of the through bill of lading is to eliminate the obstacles between the producer and consumer, and it has done much in that direction.

These and other uncontroverted facts that appear in this record would seem to constitute "circumstances and conditions" worthy of consideration, when carriers are charged with being guilty of unjust discrimination, or of giving unreasonable and undue preference or advantage to any person or locality.

But we understand the view of the commission to have been that it was not competent for the commission to consider such facts; that it was shut up, by the terms of the act of Congress, to consider only such "circumstances and conditions" as pertained to the articles of traffic after they had reached and been delivered at a port of the United States or Canada.

It is proper that we should give the views of the commission in its own words: —

"The statute has provided for the regulation of interstate traffic by interstate carriers, partly by rail, and partly by water, or all rail, shipped from one point in the United States to another destination within the United States, or from a point of shipment in the United States to a port of entry within the United States or an adjacent foreign country, or from a port of entry either within the United States or in an adjacent foreign country, on import traffic brought to such port of entry from a foreign port of shipment and destined to a place within the United States. In providing for this regulation, the statute has also provided for the methods of such regulation by publication of tariffs of rates and charges at points where the freight is received, and at which it is delivered, and also for taking into consideration the circumstances and conditions surrounding the transportation of the property. The statute has undertaken no such regulation from foreign ports of shipment to ports of entry either within the United States or to ports of entry in an adjacent foreign country, and, as between these ports, has provided for no publication of tariffs of rates and charges, but has left it to the unrestrained competition of ocean carriers, and all the circumstances and conditions surrounding it. These circumstances and conditions are, indeed, widely different, in many respects, from the circumstances and conditions surrounding the carriage of domestic interstate traffic between the States of the American Union by rail carriers; but as the regula-

tion provided for by the act to regulate commerce does not undertake to regulate or govern them, they cannot be held to constitute reasons, in themselves, why imported freight brought to a port of entry of the United States or a port of entry of an adjacent foreign country, destined to a place within the United States, should be carried at a lower rate than domestic traffic from such ports of entry, repectively, to the places of destination, in the United States, over the same line and in the same direction. To hold otherwise would be for the commission to create exceptions to the operation of the statute not found in the statute, and no other power but Congress can create such exception in the exercise of legislative authority.

"In the one case the freight is transported from a point of origin in the United States to a destination within the United States, or port of transshipment, if it be intended for export, upon open published rates, which must be reasonable and just, not unjustly preferential to one kind of traffic over another, and relatively fair and just as between localities; and the circumstances and conditions surrounding and involved in the transportation of the freight are in a very high degree material. In the other case, the freight originates in a foreign country, its carriage is commenced from a foreign port, it is carried upon rates that are not open and published, but are secret, and in making these rates it is wholly immaterial to the parties making them whether they are reasonable and just or not, so they take the freight and beat a rival, and it is equally immaterial to them whether they unjustly discriminate against surrounding or rival localities in such foreign country or not. Imported foreign merchandise has all the benefit and advantage of rates thus made in the foreign ports; it also has all the benefit and advantage of the low rates made in the ocean carriage, arising from the peculiar circumstances and conditions under which that is done; but, when it reaches a port of entry of the United States, or a port of entry of a foreign country adjacent to the United States, in either event upon a through bill of lading, destined to a place in the United States, then its carriage from such port of entry to its place of destination in the United States, under the operation of the act to regulate commerce, must be under the inland tariff from such port of entry to such place of destination, covering other like kind of traffic in the elements of bulk, weight, value, and of carriage; and no unjust preference must be given to it in carriage or facilities of carriage over other freight. In such case, all the circumstances and conditions that have surrounded its rates and carriage from the foreign port to the port of entry have had their full weight and operation, and in its carriage from the port of entry to the place of its destination in the United States. The mere fact that it is foreign merchandise thus brought from a foreign port is not a circumstance or condition, under the operation of the act to regulate commerce, which entitles it to lower rates, or any other preference in facilities

and carriage, over home merchandise, or other traffic of a like kind, carried by the inland carrier, from the port of entry to the place of destination in the United States, for the same distance, and over the same line. . . .

"The act to regulate commerce will be examined in vain to find any intimation that there shall be any difference made in the tolls, rates, or charges for, or any difference in the treatment of home and foreign merchandise, in respect to the same or similar service rendered in the transportation, when this transportation is done under the operation of this statute. Certainly, it would require a proviso or exception, plainly ingrafted upon the face of the act to regulate commerce, before any tribunal charged with its administration would be authorized to decide or hold that foreign merchandise was entitled to any preference in tolls, rates, or charges made for, or any difference in its treatment for, the same or similar service as against home merchandise. Foreign and home merchandise, therefore, under the operation of this statute, when handled and transported by interstate carriers, engaged in carriage in the United States, stand exactly upon the same basis of equality as to tolls, rates, charges, and treatment for similar services rendered.

"The business complained of in this proceeding is done in the shipment of foreign merchandise from foreign ports through ports of entry of the United States, or through ports of entry in a foreign country adjacent to the United States, to points of destination in the United States, upon through bills of lading." 4 Interst. Commerce Com. R. 512–516.

It is obvious, therefore, that the commission, in formulating the order of January 29, 1891, acted upon that view of the meaning of the statute which is expressed in the foregoing passages.

We have, therefore, to deal only with a question of law, and that is, What is the true construction, in respect to the matters involved in the present controversy, of the act to regulate commerce? If the construction put upon the act by the commission was right, then the order was lawful; otherwise, it was not.

Before we consider the phraseology of the statute, it may be well to advert to the causes which induced its enactment. They chiefly grew out of the use of railroads as the principal modern instrumentality of commerce. While shippers of merchandise are under no legal necessity to use railroads, they are so practically. The demand for speedy and prompt movement virtually forbids the employment of slow and old-fashioned methods of transportation, at least in the case of the more valuable articles of traffic. At the same time, the immense outlay of money required to build and maintain railroads, and the necessity of resorting, in securing the rights of way, to the power of eminent domain, in effect disable individual merchants and shippers from themselves providing such means of carriage. From the very nature of the case, therefore, railroads are monopolies, and

the evils that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. The companies owning the railroads were charged, and sometimes truthfully, with making unjust discriminations, between shippers and localities, with making secret agreements with some to the detriment of other patrons, and with making pools or combinations with each other, leading to oppression of entire communities.

Some of these mischiefs were partially remedied by special provisions inserted in the charters of the companies, and by general enactments by the several States, such as clauses restricting the rates of toll, and forbidding railroad companies from becoming concerned in the sale or production of articles carried, and from making unjust preferences. Relief, to some extent, was likewise found in the action of the courts in enforcing the principles of the common law applicable to common carriers, — particularly that one which requires uniformity of treatment in like conditions of service.

As, however, the powers of the States were restricted to their own territories, and did not enable them to efficiently control the management of great corporations, whose roads extend through the entire country, there was a general demand that Congress, in the exercise of its plenary power over the subject of foreign and interstate commerce, should deal with the evils complained of by a general enactment, and the statute in question was the result.

The scope or purpose of the act is, as declared in its title, to regulate commerce. It would, therefore, in advance of an examination of the text of the act, be reasonable to anticipate that the legislation would cover, or have regard to, the entire field of foreign and interstate commerce, and that its scheme of regulation would not be restricted to a partial treatment of the subject. So, too, it could not be readily supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing, nor to overlook the property rights of those who had invested money in the railroads of the country, nor to disregard the interests of the consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation.

Addressing ourselves to the express language of the statute, we find, in its first section, that the carriers that are declared to be subject to the act are those " engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the trans-

portation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country."

It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a State), as well that between the States and Territories as that going to or coming from foreign countries.

In a later part of the section it is declared that "the term 'transportation' shall include all instrumentalities of shipment or carriage."

Having thus included in its scope the entire commerce of the United States, foreign and interstate, and subjected to its regulations all carriers engaged in the transportation of passengers or property, by whatever instrumentalities of shipment or carriage, the section proceeds to declare that "all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

The significance of this language in thus extending the judgment of the tribunal established to enforce the provisions of the act to the entire service to be performed by carriers, is obvious.

Proceeding to the second section, we learn that its terms forbid any common carrier, subject to the provisions of the act, from charging, demanding, collecting, or receiving "from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of the act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions," and declare that disregard of such prohibition shall be deemed "unjust discrimination," and unlawful.

Here, again, it is observable that this section contemplates that there shall be a tribunal capable of determining whether, in given cases, the services rendered are "like and contemporaneous," whether the respective traffic is of a "like kind," and whether the transportation is under "substantially similar circumstances and conditions."

The third section makes it "unlawful for any common carrier, subject to the provisions of the act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality to any undue or unreasonable

prejudice or disadvantage in any respect whatever." It also provides that every such common carrier shall afford "all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their respective lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines."

The fourth section makes it unlawful for any such common carrier to "charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, but this shall not be construed as authorizing any common carrier to charge and receive as great compensation for a shorter as for a longer distance"; and provision is likewise made that, "upon application to the commission appointed under the provisions of the act, such common carrier may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property," and that "the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of the act."

The powers of the Interstate Commission are not very clearly defined in the act, nor is its method of procedure very distinctly outlined. It is, however, declared in the twelfth section, as amended March 2, 1889, and February 10, 1891, that the commission "shall have authority to inquire into the management of the business of all common carriers subject to the provisions of the act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is hereby authorized and required to execute and enforce the provisions of the act." It is also made the duty of any district attorney of the United States to whom the commission may apply to institute in the proper court, and to prosecute under the direction of the attorney general of the United States, all necessary proceedings for the enforcement of the provisions of the act, and for the punishment of all violations thereof. And provision is made for complaints to be made by any person, firm, corporation, association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization, before the commission, and for an investigation of such complaints to be made by the commission; and it is made the duty of the commission to make reports in writing in respect thereof, which shall include the findings of fact upon which the conclusions of the commission are based,

together with its recommendation as to what reparation, if any, should be made by any common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and any fact found.

In the present case no complaint seems to have been made before the commission by any person, firm, company, or other organization, against the Texas & Pacific Railway Company, of any disregard by said company of any provision of the statute resulting in any specific loss or damage to any one; nor has the commission, in its findings, disclosed any such loss or damage to any individual complainant. And it is made one of the contentions of the defendant company that the entire proceeding was outside of the sphere of action appointed by the act to the commission, which only had power, as claimed by defendant, to inquire into complaint made by some person or body injured by some described act of the defendant company.

The complaint in the present case was made by certain corporations of New York, Philadelphia, and San Francisco, known as "boards of trade" or "chambers of commerce," which appear to be composed of merchants and traders in those cities engaged in the business of reaching and supplying the consumers of the United States with imported luxuries, necessities, and manufactured goods generally, and as active competitors with the merchants at Boston, Montreal, Philadelphia, New Orleans, San Francisco, Chicago, and merchants in foreign countries who import direct on through bills of lading issued abroad.

We shall assume, in the disposition of the present case, that a valid complaint may be made before the commission, by such trade organizations, based on a mode or manner of treating import traffic by a defendant company, without disclosing or containing charges of specific acts of discrimination or undue preference, resulting in loss or damage to individual persons, corporations, or associations.

We do not wish to be understood as implying that it would be competent for the commission, without a complaint made before it, and without a hearing, to subject common carriers to penalties. It is also obvious that if the commission does have the power, of its own motion, to promulgate general decrees or orders which thereby become rules of action to common carriers, such exercise of power must be confined to the obvious purposes and directions of the statute. Congress has not seen fit to grant legislative powers to the commission.

With these provisions of the act and these general principles in mind, we now come to consider the case in hand.

After an investigation made by the commission on a complaint against the Texas & Pacific Railway Company and other companies by the boards of trade above mentioned, the result reached was the order of the commission made on January 29, 1891, a disregard of

which was complained of by the commission in its bill or petition filed in the Circuit Court of the United States.

The Texas & Pacific Railway Company, a corporation created by laws of the United States, and also possessed of certain grants from the State of Texas, owns a railroad extending from the city of New Orleans, through the State of Texas, to El Paso, where it connects with the railroad of the Southern Pacific Company, the two roads forming a through route to San Francisco. The Texas & Pacific Railway Company has likewise connections with other railroads and steamers, forming through freight lines to Memphis, St. Louis, and other points on the Missouri River, and elsewhere.

The defendant company admitted that, as a scheme or mode of obtaining foreign traffic, it had agencies by which, and by the use of through bills of lading, it secured shipments of merchandise from Liverpool and London, and other European ports, to San Francisco and to the other inland points named. It alleged that, in order to get this traffic, it was necessary to give through rates from the places of shipment to the places of final destination, and that in fixing said rates it was controlled by an ocean competition by sailing and steam vessels by way of the Isthmus and around the Horn, and also, to some extent, by a competition through the Canada route to the Pacific coast. These rates, so fixed and controlled, left to the defendant company and to the Southern Pacific Company, as their share of the charges made and collected, less than the local charges of said companies in transporting similar merchandise from New Orleans to San Francisco, and so, too, as to foreign merchandise carried to other inland points. The defendant further alleged that unless it used said means to get such traffic the merchandise to the Pacific coast would none of it reach New Orleans, but would go by the other means of transportation; that neither the community of New Orleans, nor any merchant or shipper thereof, was injured or made complaint; that the traffic thus secured was remunerative to the railway company, and was obviously beneficial to the consumers at the places of destination, who were thus enabled to get their goods at lower rates than would prevail if this custom of through rates was destroyed.

As we have already stated, the commission did not charge or find that the local rates charged by the defendant company were unreasonable, nor did they find that any complaint was made by the city of New Orleans, or by any person or organization there doing business. Much less did they find that any complaint was made by the localities to which this traffic was carried, or that any cause for such complaint existed.

The commission justified its action wholly upon the construction put by it on the act to regulate commerce, as forbidding the commission to consider the "circumstances and conditions" attendant upon the foreign traffic as such "circumstances and conditions" as they

are directed in the act to consider. The commission thought it was constrained by the act to regard foreign and domestic traffic as like kinds of traffic under substantially similar circumstances and conditions, and that the action of the defendant company in procuring through traffic that would, except for the through rates, not reach the port of New Orleans, and in taking its *pro rata* share of such rates, was an act of "unjust discrimination," within the meaning of the act.

In so construing the act, we think the commission erred.

As we have already said, it could not be supposed that Congress, in regulating commerce, would intend to forbid or destroy an existing branch of commerce, of value to the common carriers and to the consumers within the United States. Clearly express language must be used in the act, to justify such a supposition.

So far from finding such language, we read the act in question to direct the commission, when asked to find a common carrier guilty of a disregard of the act, to take into consideration all the facts of the given case, among which are to be considered the welfare and advantage of the common carrier, and of the great body of the citizens of the United States who constitute the consumers and recipients of the merchandise carried, and that the attention of the commission is not to be confined to the advantage of shippers and merchants who deal at or near the ports of the United States, in articles of domestic production. Undoubtedly the latter are likewise entitled to be considered; but we cannot concede that the commission is shut up, by the terms of this act, to solely regard the complaints of one class of the community. We think that Congress has here pointed out that in considering questions of this sort the commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic, rather than abandon it or not attempt to secure it. It is self-evident that many cases may and do arise where, although the object of the carriers is to secure the traffic for their own purposes and upon their own lines, yet nevertheless the very fact that they seek, by the charges they make, to secure it, operates in the interests of the public.

Moreover, it must not be overlooked that this legislation is experimental. Even in construing the terms of a statute, courts must take notice of the history of legislation, and, out of different possible constructions, select and apply the one that best comports with the genius of our institutions, and therefore most likely to have been the construction intended by the lawmaking power. Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation; and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress. The very terms of the statute, that charges must be "reasonable," that discrimination must not be "unjust," and that

preference or advantage to any particular person, firm, corporation, or locality must not be "undue" or "unreasonable," necessarily imply that strict uniformity is not to be enforced, but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers, and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act.

The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were "like and contemporaneous"; whether the kinds of traffic were "like"; whether the transportation was effected under "substantially similar circumstances and conditions." To answer such questions, in any case coming before the commission, requires an investigation into the facts; and we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered, in forming a judgment whether such differences were or were not "unjust." Some charges might be unjust to shippers, others might be unjust to the carriers. The rights and interests of both must, under the terms of the act, be regarded by the commission.

The third section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation, or locality; and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law, but of fact. The mere circumstance that there is in a given case a preference or an advantage does not, of itself, show that such preference or advantage is undue or unreasonable, within the meaning of the act. Hence it follows that, before the commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the commission in forming its judgment whether such preference or advantage is undue or unreasonable. When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the commission is to regard only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question.

The same observations are applicable to the fourth section, or the so-called "long and short haul provision," and it is unnecessary to repeat them.

The only argument urged in favor of the view of the commission, that is drawn upon the language of the statute, is found in those provisions of the statute that make it obligatory on the common carriers to publish their rates, and to file with the commission copies of joint tariffs of rates or charges over continuous lines or routes operated by more than one common carrier; and it is said that the place at which it would seem that joint rates should be published for the information of shippers would be at the place of origin of the freight, and that this cannot be done, or be compelled to be done, in foreign ports.

The force of this contention is not perceived. Room is left for the application of these provisions to traffic originating within the limits of the United States, even if, for any reason, they are not practically applicable to traffic originating elsewhere. Nor does it appear that the commission may not compel all common carriers within the reach of their jurisdiction to publish such rates, and to furnish the commission with all statements or reports prescribed by the statute. Nor was there any allegation, evidence, or finding in the present case that the Texas & Pacific Railway Company has failed to file with the commission copies of its joint tariffs, showing the joint rates from English ports to San Francisco, nor that the company has failed to make public such joint rates in such manner as the commission may have directed.

Another position taken by the commission in its report, and defended in the briefs of counsel, is that it is the duty of the commission to so construe the act to regulate commerce as to make it practically cooperate with what is assumed to be the policy of the tariff laws. This view is thus stated in the report: —

"One paramount purpose of the act to regulate commerce, manifest in all its provisions, is to give to all dealers and shippers the same rates for similar services rendered by the carrier in transporting similar freight over its line. Now, it is apparent from the evidence in this case that many American manufacturers, dealers, and localities, in almost every line of manufacture and business, are the competitors of foreign manufacturers, dealers, and localities, for supplying the wants of American consumers at interior places in the United States, and that, under domestic bills of lading, they seek to require from American carriers like service as their foreign competitors, in order to place their manufactured goods, property, and merchandise with interior consumers. The act to regulate commerce secures them this right. To deprive them of it by any course of transportation business or device is to violate the statute." 4 Interst. Commerce Com. R. 514, 515.

Our reading of the act does not disclose any purpose or intention on the part of Congress to thereby reinforce the provisions of the tariff laws. These laws differ wholly, in their objects, from the law to regulate commerce. Their main purpose is to collect revenues with which to meet the expenditures of the government, and those of their provisions, whereby Congress seeks to so adjust rates as to protect Ameri-

can manufacturers and producers from competition by foreign low-priced labor, operate equally in all parts of the country.

The effort of the commission, by a rigid general order, to deprive the inland consumers of the advantage of through rates, and to thus give an advantage to the traders and manufacturers of the large seaboard cities, seems to create the very mischief which it was one of the objects of the act to remedy.

Similar legislation by the Parliament of England may render it profitable to examine some of the decisions of the courts of that country construing its provisions.

In fact, the second section of our act was modelled upon section 90 of the English railway clauses consolidation act of 1845, known as the "Equality Clause"; and the third section of our act was modelled upon the second section of the English "Act for the better regulation of the traffic on railways and canals" of July 10, 1854, and the eleventh section of the act of July 21, 1873, entitled "An Act to make better provision for the carrying into effect the railway and canal traffic act, 1854, and for other purposes connected therewith."

One of the first cases that arose under the act of 1854 was that of Hozier *v.* The Caledonian Railway, 1 Nev. & McN. 27, where Hozier filed a petition against the railway company, alleging that he was aggrieved by being charged nine shillings for travelling between Motherwell and Edinburgh, a distance of forty-three miles; while passengers travelling in the same train, and in the class of carriage, between Glasgow and Edinburgh, were charged only two shillings, which was alleged to amount to an undue and unreasonable preference. But the petition was dismissed, and the Court said: "The only case stated in the petition is that passengers passing from Glasgow to Edinburgh are carried at a cheaper aggregate rate than passengers from Motherwell to either of these places. Now, that is an advantage, no doubt, to those passengers travelling between Edinburgh and Glasgow. But is it an unfair advantage over other passengers travelling between intermediate stations? The complainer must satisfy us that there is something unfair or unreasonable in what he complains of, in order to warrant any interference. Now I have read the statements in the petition, and listened to the argument in support of it, to find what there is unreasonable in giving that advantage to through passengers. What disadvantage do Motherwell passengers suffer by this? I think that no answer was given to this, except that there was none. This petitioner's complaint may be likened to that of the laborer who, having worked all day, complained that others, who had worked less, received a penny like himself."

The case of Foreman *v.* Great Eastern Railway Co., 2 Nev. & McN. 202, was decided by the English railway commissioners in 1875. The facts were that the complainants imported coal in their own ships from points in the north of England to Great Yarmouth, and forwarded the coal to various stations on the defendants' railway, between Great

Yarmouth and Peterborough. The complaint was that the defendants' rates for carrying coal from Yarmouth to stations in the interior, at which complainants dealt, were unreasonably greater than the rates charged in the opposite direction, from Peterborough to such stations, and that such difference in rates was made by the defendants for the purpose of favoring the carriage of coal from the interior, as against coal brought to Yarmouth by sea, and carried thence into the interior over the defendants' railway. The commissioners found that it was true that the defendants did carry coal from the interior to London, Yarmouth, and other seaports on their line, at exceptionally low rates, but that this was done for the purpose of meeting the competition existing at those places. It appeared that the rate from Peterborough to Thetford, fifty-one miles, was four shillings, while the rate from Peterborough to Yarmouth, one hundred miles, was only three shillings. The commissioners said: "As, however, the complainants do not, as far as their trade in Yarmouth itself is concerned, use the Great Eastern Railway at all, the company cannot be said to prefer other traffic to theirs; nor does the traffic act prevent a railway company from having special rates of charge to a terminus to which traffic can be carried by other routes or other modes of carriage with which theirs is in competition."

In Harris *v.* Cockermouth Railway, 1 Nev. & McN. 97, the court held it to be an undue preference for a railway company to concede to the owner of a colliery a lower rate than to the owners of other collieries, from the same point of departure to the same point of arrival, merely because the person favored had threatened to build a railway for his coal, and to divert his traffic from defendant's railway. But Chief Justice Cockburn said: "I quite agree that this court has intimated, if not absolutely decided, that a company is entitled to take into consideration any circumstances, either of a general or of a local character, in considering the rate of charge which they will impose upon any particular traffic. . . . As, for instance, in respect of terminal traffic, there might be competition with another railway; and in respect to terminal traffic, as distinguished from intermediate traffic, it might well be that they could afford to carry goods over the whole line cheaper, or proportionately so, than they could over an intermediate part of the line."

In the case of Budd *v.* London & Northwestern Railway Co., 4 Nev. & McN. 393, and in London & Northwestern Railway *v.* Evershed, 3 App. Cas. 1029, it was held that it was not competent for the railway company to make discriminations between persons shipping from the same point of departure to the same point of arrival; but, even in those cases, it was conceded that there might be circumstances of competition which might be considered. At any rate, those cases have been much modified, if not fully overruled, by the later cases, particularly in Denaby Main Colliery Co. *v.* Manchester, Sheffield, & Lincolnshire Ry. Co., 11 App. Cas. 97, and in Phipps *v.* London & Northwestern Railway, [1892] 2 Q. B. 229, 236.

The latter was the case of an application, under the railway and canal traffic acts, for an order enjoining the defendants to desist from giving an undue preference to the owners of Butlins and Islip furnaces, and from subjecting the traffic of the complainants to an undue preference, in the matter of the rates charged for the conveyance of coal, coke, and pig-iron traffic, and also for an order enjoining the defendants to desist from giving an unreasonable preference or advantage to the owners of Butlins and Islip furnaces, and the traffic therefrom, by making an allowance of fourpence per ton in respect of coal, coke, and pig iron conveyed for them by the defendants. The sidings of the Duston furnaces, belonging to the complainants, were situated on the London & Northwestern Railway, at a distance of about sixty miles from Great Bridge, one of the pig-iron markets to the westward. The sidings of the Butlins and Islip furnaces were situated on the same railway, to the east of the Duston furnaces, and a distance from the pig-iron market, as to Butlins, of about seventy-one miles, and, as to Islip, of about eighty-two miles. Duston had only access to the London & Northwestern, but Butlins and Islip had access not only to the London & Northwestern, but also to the Midland Railway. The London & Northwestern Company, which carried the Butlins pig iron eleven miles further, and the Islip pig iron twenty-two miles further, than the Duston pig iron, charged Butlins 0.95*d.* per mile, and Islip 0.84*d.* per mile; while they charged Duston 1.05*d.* per mile; so that the total charge per ton of pig iron from Duston to the western markets was 5*s.* 2*d.*, while the total charge per ton from either Butlins or Islip was 5*s.* 8*d.*

When the case was before the railway commissioners it was said by Wills, J.: "It is complained that, although along the London & N. W. Railway every ton of pig iron, every ton of coal, and every ton of coke travels a longer distance in order to reach Islip than in order to reach the applicant's premises, the charge that is put upon it, although greater than the charge which is put upon the traffic which goes to the applicant's premises, is not sufficiently greater to represent the increased distance . . . I first observe that these are, in my judgment, eminently practical questions, and if this court once attempts the hopeless task of dealing with questions of this kind with any approach to mathematical accuracy, and tries to introduce a precision which is unattainable in commercial and practical matters, it would do infinite mischief, and no good. . . . It seems to me that we must take into account the fact that at Butlins and Islip there is an effective competition with the Midland. Although effective competition with another railway company or canal company will not of itself justify a preference which is otherwise quite beyond the mark, yet still it is not a circumstance that can be thrown out of the question, and I think there is abundance of authority for that. It follows also, I think, from the view which I am disposed to take of these — being eminently practical — questions, that you must give due consideration to the commercial necessities of the companies, as a matter to be thrown in along with the others. . . . I wish emphatically to

be considered as not having attempted to lay down any principles with regard to this question of undue preference, or as to the grounds upon which I have decided it. In my judgment, undue preference is a question of fact in each case."

The railway commissioners refused to interfere, and the case was appealed. Lord Herschell stated the case, and said: —

"This application is made under the second section of the Railway and Canal Traffic Act, 1854, which provides that 'no railway company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, nor shall any such company subject any particular person or company, or particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever.'

"The question, therefore, which the tribunal, whether it be the court or the commissioners before whom such a question comes, has to determine, is whether an undue preference or advantage is being given, or whether the one party is being unduly prejudiced or put to a disadvantage, as compared with the other. I think it is clear that the section implies that there may be a preference, and that it does not make every inequality of charge an undue preference.

"Of course, if the circumstances so differ that the difference of charge is in exact conformity with the difference of circumstances, there would be no preference at all. But, as has been pointed out before, what the section provides is that there shall not be an undue or unreasonable preference or prejudice. And it cannot be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, is a question of fact. In Palmer *v.* London & Southwestern Railway Co., L. R. 1 C. P. 593, Chief Justice Erle said: 'I beg to say that the argument from authority seems to me to be without conclusive force in guiding the exercise of this jurisdiction; the question whether undue prejudice has been caused being a question of fact, depending on the matters proved in each case.'

"In Denaby Main Colliery Co. *v.* Manchester, &c. Ry. Co., 3 Nev. & McN. 426, when it was before the Court of Appeals, on an appeal arising out of the proceedings before the railway commissioners, Lord Selborne, then Lord Chancellor, said: 'The defendants gave a decided, distinct, and great advantage, as it appears to me, to the distant collieries. That may be due or undue, reasonable or unreasonable; but, under these circumstances, is not the reasonableness a question of fact? Is it not a question of fact, and not of law, whether such a preference is due or undue? Unless you can point to some other law which defines what shall be held to be reasonable or unreasonable, it must be, and is, a mere question, not of law, but of fact.'

"The Lord Chancellor there points out that the mere circumstance that there is an advantage does not of itself show that it is an undue preference, within the meaning of the act, and, further, that whether there be

such undue preference or advantage is a question of fact, and of fact alone, of the act of 1854. No rule is given to guide the court or the tribunal in the determination of cases or applications made under this second section. The conclusion is one of fact, to be arrived at, looking at the matter broadly, and applying common sense to the facts that are proved. I quite agree with Mr. Justice Wills that it is impossible to exercise a jurisdiction such as is conferred by this section by any process of mere mathematical or arithmetical calculation. When you have a variety of circumstances, differing in the one case from the other, you cannot say that a difference of circumstances represents or is equivalent to such a fraction of a penny difference of charge in the one case as compared with the other. A much broader view must be taken, and it would be hopeless to attempt to decide a case by any attempted calculation. I should say that the decision must be arrived at broadly and fairly, by looking at all the circumstances of the case, — that is, looking at all the circumstances which are proper to be looked at, because, of course, the very question in this case is whether a particular circumstance ought or ought not to be considered; but, keeping in view all the circumstances which may legitimately be taken into consideration, then it becomes a mere question of fact. . . . Now, there is no doubt that in coming to their determination the court below did have regard to competition between the Midland and the Northwestern, and the situation of these two furnaces which rendered such competition inevitable. If the appellants can make out that, in point of law, that is a consideration which cannot be permitted to have any influence at all, that those circumstances must be rigidly excluded from consideration, and that they are not circumstances legitimately to be considered, no doubt they establish that the court below has erred in point of law. But it is necessary for them to go as far as that in order to make any way with this appeal, because once admit that to any extent, for any purpose, the question of competition can be allowed to enter in, whether the court has given too much weight to it or too little becomes a question of fact, and not of law. The point is undoubtedly a very important one. . . .

"As I have already observed, the second section of the act of 1854 does not afford to the tribunal any kind of guide as to what is undue or unreasonable. It is left entirely to the judgment of the court on a review of the circumstances. Can we say that the local situation of one trader, as compared with another, which enables him, by having two competing routes, to enforce upon the carrier by either of these routes a certain amount of compliance with his demands, which would be impossible if he did not enjoy that advantage, is not among the circumstances which may be taken into consideration? I am looking at the question now as between trader and trader. It is said that it is unfair to the trader who is nearer the market that he should not enjoy the full benefit of the advantage to be derived from his geographical situation at a point on the railway nearer the market than his fellow trader who

trades at a point more distant; but I cannot see, looking at the matter as between the two traders, why the advantageous position of the one trader, in having his works so placed that he has two competitive routes, is not as much a circumstance to be taken into consideration as the geographical position of the other trader, who, though he has not the advantage of competition, is situated at a point on the line geographically nearer the market. Why the local situation in regard to its proximity to the market is to be the only consideration to be taken into account in dealing with the matter, as a matter of what is reasonable and right as between the two traders, I cannot understand.

"Of course, if you are to exclude this from consideration altogether, the result must inevitably be to deprive the trader who has the two competing routes of a certain amount of the advantages which he derives from that favorable position of his works. All that I have to say is that I cannot find anything in the act which indicates that when you are left at large, — for you are left at large, — as to whether, as between two traders, the company is showing an undue and unreasonable preference to the one, as compared with the other, you are to leave out that circumstance, any more than any other circumstance which would affect men's minds. . . . One class of cases unquestionably intended to be covered by the section is that in which traffic from a distance, of a character that competes with the traffic nearer the market, is charged low rates because, unless such low rates were charged, it would not come into the market at all. It is certain, unless some such principle as that were adopted, a large town would necessarily have its food supply greatly raised in price. So that, although the object of the company is simply to get the traffic, the public have an interest in their getting the traffic and allowing the carriage at a rate which will render that traffic possible, and so bring the goods at a cheaper rate, and one which makes it possible for those at a greater distance to compete with those situate nearer to it. . . . I cannot but think that a lower rate which is charged from a more distant point by reason of a competing route which exists thence is one of the cases which may be taken into account under those provisions, and which would fall within the terms of the enactment.

"Suppose that to insist on absolutely equal rates would practically exclude one of the two railways from the traffic; it is obvious that these members of the public who are in the neighborhood where they can have the benefit of this competition would be prejudiced by any such proceedings. And further, inasmuch as competition undoubtedly tends to diminution of charges, and the charge of carriage is one which ultimately falls upon the consumer, it is obvious that the public have an interest in the proceedings under this act of Parliament not being so used as to destroy a traffic which can never be secured but by some such reduction of charge, and the destruction of which would be prejudicial to the public, by tending to increase prices."

The learned judge then proceeded to discuss the authorities, and pointed out that the case of Budd v. London & Northwestern Railway

Co., and Evershed's Case, are no longer law, so far as the second section of the act of 1854 is concerned.

Lindley and Kay, Lord Justices, gave concurring opinions, and the conclusion of the court was that the commissioners did not err in taking into consideration the fact that there was a competing line together with all the other facts of the case, and in holding that a preference or advantage thence arising was not undue or unreasonable.

The precise question now before us has never been decided in the American cases, but there are several in which somewhat analogous questions have been considered.

Atchison, Topeka, & Santa Fé Railroad *v.* Denver & New Orleans Railroad, 110 U. S. 667, was a case arising under a provision of the Constitution of the State of Colorado which declares "that all individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State, and no railroad company shall give any preference to individuals, associations, or corporations in furnishing cars or motive power." This court held that under this constitutional provision a railroad company which had made provisions with a connecting road for the transaction of joint business at an established union junction was not required to make similar provisions with a rival connecting line at another near point on its line, and that the constitutional provision is not violated by refusing to give to a connecting road the same arrangement as to through rates which are given to another connecting line, unless the conditions as to the service are substantially alike in both cases.

The sixth section of the act of Congress (July 1, 1862) relative to the Union Pacific Railroad Company provided that the government shall at all times have the preference in the use of the railroad, "at fair and reasonable rates of compensation, not to exceed the amount paid by private parties for the same kind of service." In the case of Union Pac. Railway *v.* U. S., 117 U. S. 355, it was, in effect, held that the service rendered by a railway company in transporting local passengers from one point on its line to another is not identical with the service rendered in transporting through passengers over the same rails.

A petition was filed before the Interstate Commerce Commission by the Pittsburgh, Cincinnati, & St. Louis Railway Company against the Baltimore & Ohio Railroad Company, seeking to compel the latter company to withdraw from its lines of road, upon which business competition with that of the petitioner was transacted, the so-called "party rates," and to decline to give such rates in the future; also, for an order requiring said company to discontinue the practice of selling excursion tickets at less than the regular rate. The cause was heard before the commission, which held the so-called "party rate tickets," in so far as they were sold for lower rates for each member of a party of ten or more than rates contemporaneously charged for the transporta-

tion of single passengers between the same points, constituted unjust discrimination, and were therefore illegal. The defendant company refusing to obey the mandate of the commission, the latter filed a bill in the Circuit Court of the United States for the Southern District of Ohio, asking that the defendant be enjoined from continuing in its violation of the order of the commission. The Circuit Court dismissed the bills Some of the observations made by Jackson, Circuit Judge, may well be cited (43 Fed. 37): "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits. Conceding the same terms of contract to all persons equally, may not the carrier adopt both wholesale and retail rates for its transportation service?" Again: "The English cases establish the rule that, in passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interests of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other, as competitive or otherwise."

The case was brought to this Court, and the judgment of the Circuit Court dismissing the bill was affirmed. Interstate Commerce Commission *v.* Baltimore & Ohio Railroad, 145 U. S. 263. The court, through Mr. Justice Brown, cited with approval passages from the opinion of Judge Jackson in the court below, and, among other things, said: "It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust and unreasonable."

Again, speaking of the sale of a ticket for a number of passengers at a less rate than for a single passenger, it was said: "It does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is able, in a particular instance, to travel at a less rate than he. If it operates injuriously to any one, it is to the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another. . . . If these tickets were withdrawn the defendant road would lose a large amount of travel, and the single-trip passenger would gain absolutely nothing."

The conclusions that we draw from the history and language of the

act, and from the decisions of our own and the English courts, are mainly these: that the purpose of the act is to promote and facilitate commerce, by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations; that, in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that in the exercise of its jurisdiction the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and, in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered, as well as that of the communities which are in the locality of the place of shipment; that among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights, which would otherwise go by other competitive routes, are or are not undue and unjust, the fair interests of the carrier companies, and the welfare of the community which is to receive and consume the commodities, are to be considered; that if the commission, instead of confining its action to redressing, on complaint made by some particular person, firm, corporation, or locality, some specific disregard by common carriers of provisions of the act, proposes to promulgate general orders, which thereby become rules of action to the carrying companies, the spirit and letter of the act require that such orders should have in view the purpose of promoting and facilitating commerce, and the welfare of all to be affected, as well the carriers as the traders and consumers of the country.

It may be said that it would be impossible for the commission to frame a general order if it were necessary to enter upon so wide a field of investigation, and if all interests that are liable to be affected were to be considered. This criticism, if well founded, would go to show that such orders are instances of general legislation, requiring an exercise of the law making power, and that the general orders made by the commission in March, 1889, and January, 1891, instead of being regulations calculated to promote commerce and enforce the express provisions of the act, are themselves laws of wide import, destroying some branches of commerce that have long existed, and undertaking to change the laws and customs of transportation in the promotion of what is supposed to be public policy.

This is manifest from the facts furnished us in the report and findings of the commission, attached as an exhibit to the bill filed in the Circuit Court.

It is stated in that report that the Illinois Central Railroad Company,

one of the respondents in the proceeding before the commission, averred in its answer that it was constrained, by its obedience to the order of March, 1889, to decline to take for shipment any import traffic, and, to its great detriment, to refrain from the business, for the reason that, to meet the action of the competing lines, it would have to make a less rate on the import than on the domestic traffic.

Upon this disclosure that their order had resulted in depriving that company of a valuable part of its traffic, (to say nothing of its necessary effect in increasing the charges to be finally paid by the consumers,) the commission, in its report, naively remarks, "This lets the Illinois Central Railway Company out." 4 Interst. Commerce Com. R. 458.

We also learn from the same source that there was competent evidence adduced before the commission, on the part of the Pennsylvania Railroad Company, that since that company, in obedience to the order of March, 1889, has charged the full inland rate on the import traffic, the road's business in that particular has considerably fallen off; that the steamship lines have never assented to the road's charging its full inland rates, and have been making demands on the road for a proper division of the through rate; that, if it were definitely determined that the road was not at liberty to charge less than the full inland rate, the result would be that it would effectually close every steamship line sailing to and from Baltimore and Philadelphia.

The commission did not find it necessary to consider this evidence, because the Pennsylvania Railroad Company was before it in the attitude of having obeyed the order.

We do not refer to these matters for the purpose of indicating what conclusions ought to have been reached by the commission or by the courts below in respect to what were proper rates to be charged by the Texas & Pacific Railway Company. That was a question of fact, and, if the inquiry had been conducted on a proper basis, we should not have felt inclined to review conclusions so reached. But we mention them to show that there manifestly was error in excluding facts and circumstances that ought to have been considered, and that this error arose out of a misconception of the purpose and meaning of the act.

The Circuit Court held that the order of January 29, 1891, was a lawful order, and enjoined the defendant company from carrying any article of import traffic shipped from any foreign port through any port of entry in the United States, or any port of entry in a foreign country adjacent to the United States, upon through bills of lading, and destined to any place within the United States, upon any other than the published inland tariff covering the transportation of other freight of like kind over its line from such port of entry to such place of destination, or from charging or accepting for its share of through rates upon imported traffic a lower sum than it charges or receives for domestic traffic of like kind, to the same destination, from the point at which the imported traffic enters the country.

In treating the facts of the case, the court says: "It must be conceded as true, for the purposes of the present case, that the rates for the transportation of traffic from Liverpool and London to San Francisco are, in effect, fixed and controlled by the competition of sailing vessels between these ports, and also by the competition of steamships and sailing vessels in connection with railroads across the Isthmus of Panama, none of which are in any respect subject to the act to regulate commerce. It must also be conceded that the favorable rates given to the foreign traffic are, for reasons to which it is now unnecessary to revert, somewhat remunerative to the defendant; and it must also be conceded that the defendant would lose the foreign traffic, by reason of the competition referred to, and the revenue derived therefrom, unless it carries at the lower rates, and by so doing is enabled to get part of it, which would otherwise go from London and Liverpool to San Francisco, around the Horn, or by way of the Isthmus." Interstate Commerce Commission *v.* Texas & Pacific Railway, 52 Fed. 187.

The Circuit Court did not discuss the case at length, either as to its law or facts, but, in effect, approved the order of January 29, 1891, as valid, and enjoined the defendant company from disregarding it.

The Circuit Court of Appeals seems to have disapproved of the construction put on the act by the commission. . . .

Having thus intimated its dissent from, or, at least, its distrust of, the view of the commission, the court proceeded to affirm the decree of the Circuit Court and the validity of the order of the commission, upon the ground that, even if ocean competition should be regarded as creating a dissimilar condition, yet that in the present case the disparity in rates was too great to be justified by that condition.

This course proceeded, we think, upon an erroneous view of the position of the case. That question was not presented to the consideration of the Court. There was no allegation in the commission's bill or petition that the inland rates charged by the defendant company were unreasonable. That issue was not presented. The defendant company was not called upon to make any allegation on the subject. No testimony was adduced by either party on such an issue. What the commission complained of was that the defendant refused to recognize the lawfulness of its order; and what the defendant asserted, by way of defence, was that the order was invalid, because the commission had avowedly declined to consider certain "circumstances and conditions," which, under a proper construction of the act, it ought to have considered.

If the Circuit Court of Appeals were of opinion that the commission, in making its order, had misconceived the extent of its powers, and if the Circuit Court had erred in affirming the validity of an order made under such misconception, the duty of the Circuit Court of Appeals was to reverse the decree, set aside the order, and remand the cause to the commission, in order that it might, if it saw fit, proceed therein according to law. The defendant was entitled to have its de-

fence considered, in the first instance, at least, by the commission, upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. The questions whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the commission in the light of all facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the Circuit Court of Appeals should undertake, of its own motion, to find and pass upon such questions of fact, in a case in the position in which the present one was.

We do not, of course, mean to imply that the commission may not directly institute proceedings in a Circuit Court of the United States charging a common carrier with disregard of provisions of the act, and that thus it may become the duty of the court to try the case in the first instance. Nor can it be denied that, even when a petition is filed by the commission for the purpose of enforcing an order of its own, the court is authorized to "hear and determine the matter as a court of equity," which necessarily implies that the court is not concluded by the findings or conclusions of the commission; yet, as the act provides that on such hearing the findings of fact in the report of said commission shall be *prima facie* evidence of the matters therein stated, we think it plain that if, in such a case, the commission has failed, in its proceedings, to give notice to the alleged offender, or has unduly restricted its inquiries, upon a mistaken view of the law, the court ought not to accept the findings of the commission as a legal basis for its own action, but should either inquire into the facts on its own account, or send the case back to the commission to be lawfully proceeded in.

The mere fact that the disparity between the through and the local rates was considerable, did not, of itself, warrant the court in finding that such disparity constituted an undue discrimination. Much less did it justify the court in finding that the entire difference between the two rates was undue or unreasonable, especially as there was no person, firm, or corporation complaining that he or they had been aggrieved by such disparity.

The decree of the Circuit Court of Appeals is reversed. The decree of the Circuit Court is also reversed, and the cause is remanded to that court, with directions to dismiss the bill.

Mr. Justice HARLAN, with whom concurred Mr. Justice BROWN, dissenting.[1]

The question is presented whether the Texas & Pacific Railway Company can, consistently with the act of Congress, charge a higher rate for the transportation of goods starting from New Orleans and destined to San Francisco than for the transportation between the same places of goods of the same kind in all the elements of bulk, weight,

[1] Part of this opinion is omitted. — ED.

value, and expense of carriage, brought to New Orleans from Liverpool on a through bill of lading, and to be carried to San Francisco. If this question be answered in the affirmative; if all the railroad companies whose lines extend inland from the Atlantic and Pacific seaboards indulge in like practices, and if one may do so, all may and will do so; if such discrimination by American railways, having arrangements with foreign companies, against goods, the product of American skill, enterprise, and labor, is consistent with the act of Congress — then the title of that act should have been one to regulate commerce to the injury of American interests, and for the benefit of foreign manufacturers and dealers. . . .

I am unable to find in these sections any authority for the commission, or for a carrier subject to the provisions of the act of Congress, to take into consideration the rates established by ocean lines as affecting the charges that an American carrier may make for the transportation of property over its routes. . . .

Congress intended that all property transported by a carrier subject to the provisions of the act should be carried without any discrimination because of its origin. The rule intended to be established was one of equality in charges, as between a carrier and all shippers, in respect of like and contemporaneous service performed by the carrier over its line, between the same points, without discrimination based upon conditions and circumstances arising out of that carrier's relations with other carriers or companies, especially those who cannot be controlled by the laws of the United States. . . .

It seems to me that any other interpretation of the act of Congress puts it in the power of railroad companies which have established, or may establish, business arrangements with foreign companies engaged in ocean transportation, to do the grossest injustice to American interests. I find it impossible to believe that Congress intended that freight originating in Europe or Asia and transported by an American railway from an American port to another part of the United States could be given advantages in the matter of rates, for services performed in this country, which are denied to like freight originating in this country, and passing over the same line of railroad between the same points. To say that Congress so intended is to say that its purpose was to subordinate American interests to the interests of foreign countries and foreign corporations. Such a result will necessarily follow from any interpretation of the act that enables a railroad company to exact greater compensation for the transportation from an American port of entry, of merchandise originating in this country, than is exacted for the transportation over the same route of exactly the same kind of merchandise brought to that port from Europe or Asia, on a through bill of lading, under an arrangement with an ocean transportation company. Under such an interpretation the rule established by Congress to secure the public against unjust discrimination by carriers subject to the provisions of the Interstate Commerce Act would be dis-

placed by a rule practically established in foreign countries by foreign companies, acting in combination with American railroad corporations seeking, as might well be expected, to increase their profits, regardless of the interests of the public or of individuals.

I am not much impressed by the anxiety which the railroad company professes to have for the interests of the consumers of foreign goods and products brought to this country under an arrangement as to rates made by it with ocean transportation lines. We are dealing in this case only with a question of rates for the transportation of goods from New Orleans to San Francisco over the defendant's railroad. The consumers at San Francisco, or those who may be supplied from that city, have no concern whether the goods reach them by way of railroad from New Orleans, or by water around Cape Horn, or by the route across the Isthmus of Panama. . . .

It is said that the Interstate Commerce Commission is entitled to take into consideration the interests of the carrier. My view is that the act of Congress prescribes a rule which precludes the commission or the courts from taking into consideration any facts outside of the inquiry, whether the carrier, for like and contemporaneous services, performed in this country under substantially similar circumstances and conditions, may charge one shipper more or less than he charges another shipper of like goods over the same route, and between the same points. Undoubtedly, the carrier is entitled to reasonable compensation for the service it performs. But the necessity that a named carrier shall secure a particular kind of business is not a sufficient reason for permitting it to discriminate unjustly against American shippers, by denying to them advantages granted to foreign shippers. Congress has not legislated upon such a theory. It has not said that the inquiry whether the carrier has been guilty of unjust discrimination shall depend upon the financial necessities of the carrier. On the contrary, its purpose was to correct the evils that had arisen from unjust discrimination made by carriers engaged in interstate commerce. It has not, I think, declared, nor can I suppose it will ever distinctly declare, that an American railway company, in order to secure for itself a particular business, and realize a profit therefrom, may burden interstate commerce in articles originating in this country by imposing higher rates for the transportation of such articles from one point to another point in the United States than it charges for the transportation between the same points, under the same circumstances and conditions, of like articles originating in Europe, and received by such company on a through bill of lading issued abroad. Does any one suppose that if the Interstate Commerce bill, as originally presented, had declared, in express terms, that an American railroad company might charge more for the transportation of American freight between two given places in this country than it charged for foreign freight between the same points, that a single legislator would have sanctioned it by his vote? Does any one suppose that an American President would have approved such legislation? . . .

I cannot accept this view, and therefore dissent from the opinion and judgment of the court.

I am authorized by Mr. Justice BROWN to say that he concurs in this opinion.

Mr. Chief Justice FULLER, dissenting.

In my judgment, the second and third sections of the Interstate Commerce Act are rigid rules of action, binding the commission as well as the railway companies. The similar circumstances and conditions referred to in the act are those under which the traffic of the railways is conducted, and the competitive conditions which may be taken into consideration by the commission are the competitive conditions within the field occupied by the carrier, and not competitive conditions arising wholly outside of it.

I am therefore constrained to dissent from the opinion and judgment of the court.

WIGHT *v.* UNITED STATES.

SUPREME COURT OF THE UNITED STATES, 1897.

[167 *U. S.* 512.]

MR. JUSTICE BREWER delivered the opinion of the court.[1]

In order to induce Mr. Bruening to transfer his transportation from a competing road to its own line, the Baltimore & Ohio Railroad Company, through the defendant, in the first place, made an arrangement by which, for 15 cents per hundred weight, it would bring the beer from Cincinnati, and deliver it at his warehouse; that afterwards this arrangement was changed, and it delivered the beer to Mr. Bruening at its depot, and allowed him 3½ cents per hundred for carting it to his warehouse. As Mr. Bruening had the benefit of a siding connection with the competing road, and could get the beer delivered over that road at his warehouse for 15 cents, it apparently could not induce him to transfer his business from the other road to its own without extending to him this rebate. During all this time it was carrying beer for Mr. Wolf from the same place of shipment (Cincinnati) to the same depot in Pittsburg, and charging him 15 cents therefor. Mr. Wolf had no siding connection with the rival road, and therefore had to pay for his cartage, by whichever road it was carried. His warehouse was, in a direct line, 140 yards from the depot, while Mr. Bruening's was 172 yards, though the latter generally carted the beer by a longer route, on account of the steepness of the ascent. Now, it is contended by the defendant that it was necessary for the Baltimore & Ohio Company to

[1] Part of the opinion is omitted. — ED.

offer this inducement to Mr. Bruening in order to get his business, and not necessary to make the like offer to Mr. Wolf, because he would have to go to the expense of carting, by whichever road he transported; that therefore the traffic was not "under substantially similar circumstances and conditions," within the terms of section 2. We are unable to concur in this view. Whatever the Baltimore & Ohio Company might lawfully do to draw business from a competing line, whatever inducements it might offer to the customers of that competing line to induce them to change their carrier, is not a question involved in this case. The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road, and to forbid it by any device to enforce higher charges against one than another. Counsel insist that the purpose of the section was not to prohibit a carrier from rendering more service to one shipper than to another for the same charge, but only that for the same service the charge should be equal, and that the effect of this arrangement was simply the rendering to Mr. Bruening of a little greater service for the 15 cents than it did to Mr. Wolf. They say that the section contains no prohibition of extra service or extra privileges to one shipper over that rendered to another. They ask whether, if one shipper has a siding connection with the road of a carrier, it cannot run the cars containing such shipper's freight onto that siding, and thus to his warehouse, at the same rate that it runs cars to its own depot, and there delivers goods to other shippers who are not so fortunate in the matter of sidings. But the service performed in transporting from Cincinnati to the depot at Pittsburg was precisely alike for each. The one shipper paid 15 cents a hundred; the other, in fact, but 11½ cents. It is true, he formally paid 15 cents, but he received a rebate of 3½ cents; and regard must always be had to the substance, and not to the form. Indeed, the section itself forbids the carrier, "directly or indirectly by any special rate, rebate, drawback, or other device," to charge, demand, collect, or receive from any person or persons a greater or less compensation, etc. And section 6 of the act, as amended in 1889, throws light upon the intent of the statute; for it requires the common carrier, in publishing schedules, to "state separately the terminal charges, and any rules or regulations which in anywise change, affect or determine any part or the aggregate of such aforesaid rates and fares and charges." It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

It may be that the phrase, "under substantially similar circumstances and conditions," found in section 4 of the act, and where the matter of the long and short haul is considered, may have a broader meaning or a wider reach than the same phrase found in section 2. It will be time enough to determine that question when it is presented.

For this case it is enough to hold that that phrase, as found in section 2, refers to the matter of carriage, and does not include competition.

We see no error in the record, and the judgment of the District Court is affirmed.

Mr. Justice WHITE concurs in the judgment.

INTERSTATE COMMERCE COMMISSION *v.* DETROIT, GRAND HAVEN, & MILWAUKEE RAILWAY.

SUPREME COURT OF THE UNITED STATES, 1897.

[167 *U. S.* 633.]

MR. JUSTICE SHIRAS delivered the opinion of the court.[1]

The petition of Stone & Carten, retail merchants at Ionia, addressed to the Interstate Commerce Commission, alleged violations by the railway company of sections 2, 3, and 4 of the Interstate Commerce Act.

The opinion of the commission sustained the petition avowedly under section 4 of the act. . . .

The sole complaint urged is that the railway company carts goods to and from its station or warehouse at Grand Rapids without charging its customers for such service, while its customers at Ionia are left themselves to bring their goods to and take them from the company's warehouse, and that, in its schedules posted and published at Grand Rapids, there is no notice or statement by the company of the fact that it furnishes such cartage free of charge. These acts are claimed to constitute violations of sections 4 and 6 of the Interstate Commerce Act. . . .

For a period of upward of twenty-five years before these proceedings this company has openly and notoriously, at its own expense, transferred goods and merchandise to and from its warehouse to the places of business of its patrons in the city of Grand Rapids. The station of the company, though within the limits of the city, is distant, on an average, 1¼ miles from the business sections of the city where the traffic of the places tributary to the company's road originates and terminates. . . .

Under the facts as found and the concessions as made, the Commission's proposition may be thus stated. There is, conventionally, no difference, as to distance, between Ionia and Grand Rapids, and the same rates and charges for like kinds of property are properly made in the case of both cities. But, as there is an average distance

[1] Part of the opinion is omitted.

of 1¼ of a mile between the station at Grand Rapids and the warehouses and offices of the shippers and consignees, such average distance must be regarded as part of the railway company's line, if the company furnishes transportation facilities for such distance; and if it refrains from making any charge for such transportation facilities, and fails to furnish the same facilities at Ionia, this is equivalent to charging and receiving a greater compensation in the aggregate for the transportation of a like kind of property for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance.

The Circuit Court of Appeals was of opinion that this proposition is based on a false assumption, namely, that the distance between the company's station and the warehouses of the shippers and consignees is part of the company's railway line, or is made such by the act of the company in furnishing vehicles and men to transport the goods to points throughout the city of Grand Rapids. The view of that court was that the railway transportation ends when the goods reach the terminus or station and are there unshipped, and that anything the company does afterwards, in the way of land transportation, is a new and distinct service, not embraced in the contract for railway carriage. The court, in a learned opinion by District Judge Hammond, enforced this view by a reference to numerous English cases, which hold that the collecting and delivery of goods is a separate and distinct business from that of railway carriage; that, when railroad companies undertake to do for themselves this separate business, they thereby are subjected to certain statutory regulations and restrictions in respect to such separate business; and that they cannot avoid such restrictions by making a consolidated charge for the railway and cartage service. 43 U. S. App. 308.

We agree with the Circuit Court of Appeals in thinking that the fourth section of the Interstate Commerce Act has in view only the transportation of passengers and property by rail, and that, when the passengers and property reached and were discharged from the cars at the company's warehouse or station at Grand Rapids, for the same charges as those received for similar service at Ionia, the duties and obligations cast upon this company by the fourth section were fulfilled and satisfied. The subsequent history of the passengers and property, whether carried to their places of abode and of business by their own vehicles, or by those furnished by the railway company, would not concern the Interstate Commerce Commission. . .

The decree of the Circuit Court of Appeals is affirmed.

INTERSTATE COMMERCE COMMISSION *v.* ALABAMA MIDLAND RAILWAY.

SUPREME COURT OF THE UNITED STATES, 1897.

[168 *U. S.* 144.]

ON the 27th day of June, 1892, the board of trade of Troy, Ala., filed a complaint before the Interstate Commerce Commission, at Washington, D. C., against the Alabama Midland Railway Company and the Georgia Central Railroad Company and their connections; claiming that, in the rates charged for transportation of property by the railroad companies mentioned, and their connecting lines, there was a discrimination against the town of Troy, in violation of the terms and provisions of the Interstate Commerce Act of Congress of 1887.

The general ground of complaint was that, Troy being in active competition for business with Montgomery, the defendant lines of railway unjustly discriminate in their rates against the former, and gave the latter an undue preference or advantage, in respect to certain commodities and classes of traffic.[1] . . .

The commission, having heard this complaint on the evidence theretofore taken, ordered, on the 15th day of August, 1893, the roads participating in the traffic involved in this case "to cease and desist" from charging, demanding, collecting, or receiving any greater compensation in the aggregate for services rendered in such transportation than is specified. . . .

The defendants having failed to heed these orders, the commission thereupon filed this bill of complaint in the Circuit Court of the United States for the Middle District of Alabama, in equity, to compel obedience to the same.

MR. JUSTICE SHIRAS delivered the opinion of the court.

Several of the assignments of error complain of the action of the Circuit Court of Appeals in not rendering a decree for the enforcement of those portions of the order of the Interstate Commerce Commission which prescribed rates to be thereafter charged by the defendant companies for services performed in the transportation of goods.

Discussion of those assignments is rendered unnecessary by the recent decisions of this court, wherein it has been held, after elaborate argument, that Congress has not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates, either maximum, or minimum, or absolute, and that, as it did not give the express power to the commission, it did not intend to secure the same result indirectly, by empowering that tribunal, after having

[1] Part of the statement of facts is omitted. — ED.

determined what, in reference to the past, were reasonable and just rates, to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just. Cincinnati, New Orleans, & Texas Pacific Railway *v.* Interstate Commerce Commission, 162 U. S. 184; Interstate Commerce Commission *v.* Cincinnati, New Orleans, & Texas Pacific Railway, 167 U. S. 479.

Errors are likewise assigned to the action of the court in having failed and refused to affirm and enforce the report and opinion of the commission, wherein it was found and decided, among other things, that the defendant common carriers which participate in the transportation of class goods to Troy from Louisville, St. Louis, and Cincinnati, and from New York, Baltimore, and other Northeastern points, and the defendants, common carriers which participate in the transportation of phosphate rock from South Carolina and Florida to Troy, and the defendants, common carriers which participate in the transportation of cotton from Troy to the ports of New Orleans, Brunswick, Savannah, Charleston, West Point, or Norfolk, as local shipments, or for export, have made greater charges, under substantially similar circumstances and conditions, for the shorter distance to or from Troy than for longer distances over the same lines in the same direction, and have unjustly discriminated in rates against Troy, and subjected said place and dealers and shippers therein to undue and unreasonable prejudice and disadvantage in favor of Montgomery, Eufaula, Columbus, and other places and localities, and dealers and shippers therein, in violation of the provisions of the act to regulate commerce.

Whether competition between lines of transportation to Montgomery, Eufaula, and Columbus justifies the giving to those cities a preference or advantage in rates over Troy, and, if so, whether such a state of facts justifies a departure from equality of rates without authority from the Interstate Commerce Commission, under the proviso to the fourth section of the act, are questions of construction of the statute, and are to be determined before we reach the question of fact in this case.

It is contended in the briefs filed on behalf of the Interstate Commission that the existence of rival lines of transportation, and consequently of competition for the traffic, are not facts to be considered by the commission or by the courts when determining whether property transported over the same line is carried under "substantially similar circumstances and conditions," as that phrase is found in the fourth section of the act.

Such, evidently, was not the construction put upon this provision of the statute by the Commission itself in the present case, for the record discloses that the Commission made some allowance for the alleged dissimilarity of circumstances and conditions, arising out of competition and situation, as affecting transportation to Montgomery

and Troy, respectively, and that among the errors assigned is one complaining that the court erred in not holding that the rates prescribed by the commission in its order made due allowance for such dissimilarity.

So, too, in In re Louisville & Nashville Railroad, 1 Interst. Commerce Com. R. 31, 78, in discussing the long and short haul clause, it was said by the Commission, per Judge Cooley, that "it is impossible to resist the conclusion that in finally rejecting the 'long and short haul clause' of the house bill, which prescribed an inflexible rule, not to be departed from in any case, and retaining in substance the fourth section as it had passed the Senate, both houses understood that they were not adopting a measure of strict prohibition in respect to charging more for the shorter than for the longer distance, but that they were, instead, leaving the door open for exceptions in certain cases, and, among others, in cases where the circumstances and conditions of the traffic were affected by the element of competition, and where exceptions might be a necessity if the competition was to continue. And water competition was, beyond doubt, especially in view."

It is no doubt true that in a later case (Railroad Commission of Georgia *v.* Clyde S. S. Co., 5 Interst. Commerce Com. R. 326) the commission somewhat modified their holding in the Louisville & Nashville Railroad Company Case, just cited, by attempting to restrict the competition that it is allowable to consider to the cases of competition with water carriers, competition with foreign railroads, and competition with railroad lines wholly in a single State; but the principle that competition in such cases is to be considered is affirmed.

That competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the act to regulate commerce, has been held by many of the Circuit Courts. It is sufficient to cite a few of the number: Ex parte Koehler, 31 Fed. 315; Missouri Pacific Ry. *v.* Texas & Pacific Ry., Id. 862; Interstate Commerce Commission *v.* Atchison, T. & S. F. Railroad, 50 Fed. 295; Interstate Commerce Commission *v.* New Orleans & Texas Pacific Railroad, 56 Fed. 925, 943; Behlmer *v.* Louisville & Nashville Railroad, 71 Fed. 835; Interstate Commerce Commission *v.* Louisville & Nashville Railroad, 73 Fed. 409.

In construing statutory provisions forbidding railway companies from giving any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, the English courts have held, after full consideration, that competition between rival lines is a fact to be considered, and that a preference or advantage thence arising is not necessarily undue or unreasonable. Denaby

Main Colliery Co. *v.* Manchester, Sheffield, & Lincolnshire Railway, 11 App. Cas. 97; Phipps *v.* London & Northwestern Railway, [1892] 2 Q. B. 229.

But the question whether competition, as affecting rates, is an element for the Commission and the courts to consider in applying the provisions of the act to regulate commerce, is not an open question in this court.

In Interstate Commerce Commission *v.* Baltimore & Ohio Railroad, 145 U. S. 263, it was said, approving observations made by Jackson, Circuit Judge (43 Fed. 37), that the act to regulate commerce was "not designed to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the road; in other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail; that it is not all discriminations or preferences that fall within the inhibitions of the statute, — only such as are unjust or unreasonable"; and, accordingly, it was held that the issue by a railway company, engaged in interstate commerce, of a "party-rate ticket" for the transportation of ten or more persons from a place situated in one State or Territory to a place situated in another State or Territory, at a rate less than that charged to a single individual for a like transportation on the same trip, does not thereby make "an unjust or unreasonable charge" against such individual, within the meaning of the first section of the act to regulate commerce, nor make "an unjust discrimination" against him, within the meaning of the second section, nor give "an undue or unreasonable preference or advantage" to the purchasers of the party-rate ticket, within the meaning of the third section.

In Texas & Pacific Railway *v.* Interstate Commerce Commission, 162 U. S. 197, it was held that, "in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and, in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment; that among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges, made at a low rate to secure foreign

freights which would otherwise go by other competitive routes, are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered."

To prevent misapprehension, it should be stated that the conclusion to which we are led by these cases, that, in applying the provisions of the third and fourth sections of the act, which make it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, competition which affects rates is one of the matters to be considered, is not applicable to the second section of the act.

As we have shown in the recent case of Wight *v.* U. S., 167 U. S. 512, the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; and we there held that the phrase, "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage, and does not include competition between rival routes.

This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for what we hold is that, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation, among which we find the fact of competition when it affects rates.

In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration, in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such

cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration.

It is further contended, on behalf of the appellant, that the courts below erred in holding, in effect, that competition of carrier with carrier, both subject to the act to regulate commerce, will justify a departure from the rule of the fourth section of the act without authority from the Interstate Commerce Commission, under the proviso to that section.

In view of the conclusion hereinbefore reached, the proposition comes to this: that when circumstances and conditions are substantially dissimilar the railway companies can only avail themselves of such a situation by an application to the commission.

The language of the proviso is as follows: —

"That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than shorter distances for the transportation of persons or property, and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

The claim now made for the Commission is that the only body which has the power to relieve railroad companies from the operation of the long and short haul clause on account of the existence of competition, or any other similar element which would make its application unfair, is the Commission itself, which is bound to consider the question, upon application by the railroad company, but whose decision is discretionary and unreviewable.

The first observation that occurs on this proposition is that there appears to be no allegation in the bill or petition raising such an issue. The gravamen of the complaint is that the defendant companies have continued to charge and collect a greater compensation for services rendered in transportation of property than is prescribed in the order of the Commission. It was not claimed that the defendants were precluded from showing in the courts that the difference of rates complained of was justified by dissimilarity of circumstances and conditions, by reason of not having applied to the Commission to be relieved from the operation of the fourth section.

Moreover, this view of the scope of the proviso to the fourth section does not appear to have ever been acted upon or enforced by the Commission. On the contrary, in the case of In re Louisville & Nashville Railroad *v.* Interstate Commerce Commission, 1 Interst. Commerce Com. R. 31, 57, the Commission, through Judge Cooley, said, in speaking of the effect of the introduction into the fourth section of the words, "under substantially similar circumstances and conditions," and of the meaning of the proviso: "That which the act does not declare unlawful must remain lawful, if it was so before; and that which it fails to forbid the carrier is left at liberty to do, with-

out permission of any one. . . . The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since, if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated. . . . Beyond question, the carrier must judge for itself what are the 'substantially similar circumstances and conditions' which preclude the special rate, rebate, or drawback which is made unlawful by the second section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of the consequences, but the special rate, rebate, or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it; and, as Congress clearly intended this, it must also, when using the same words in the fourth section, have intended that the carrier whose privilege was in the same way limited by them should in the same way act upon its judgment of the limiting circumstances and conditions."

The view thus expressed has been adopted in several of the Circuit Courts. Interstate Commerce Commission *v.* Atchison, Topeka, &c. Railroad, 50 Fed. 295, 300; Interstate Commerce Commission *v.* Cincinnati, N. O. & Tex. Pac. Ry., 56 Fed. 925, 942; Behlmer *v.* Louisville & Nashville Railroad, 71 Fed. 835, 839. And we do not think the courts below erred in following it in the present case. We are unable to suppose that Congress intended, by the fourth section and the proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them so to do. Much less do we think that it was the intention of Congress that the decision of the Commission, if applied to, could not be reviewed by the courts. The provisions of section 16 of the act, which authorize the court to "proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises, and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition," extend as well to an inquiry or proceeding under the fourth section as to those arising under the other sections of the act.

Upon these conclusions, that competition between rival routes is one of the matters which may lawfully be considered in making rates, and that substantial dissimilarity of circumstances and conditions

may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line, we are brought to consider whether, upon the evidence in the present case, the courts below erred in dismissing the Interstate Commerce Commission's complaint.

As the third section of the act, which forbids the making or giving any undue or unreasonable preference or advantage to any particular person or locality, does not define what, under that section, shall constitute a preference or advantage to be undue or unreasonable, and as the fourth section, which forbids the charging or receiving greater compensation in the aggregate for the transportation of like kinds of property for a shorter than for a longer distance over the same line, under substantially similar circumstances and conditions, does not define or describe in what the similarity or dissimilarity of circumstances and conditions shall consist, it cannot be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact, depending on the matters proved in each case. Denaby Main Colliery Co. *v.* Manchester, &c. Ry. Co., 3 Railway & Can. Cas. 426; Phipps *v.* London & Northwestern Railway, [1892] 2 Q. B. 229; Cincinnati, N. O. & Tex. Pac. Ry. *v.* Interstate Commerce Commission, 162 U. S. 184, 194; Texas & Pacific Railway *v.* Interstate Commerce Commission, 162 U. S. 197, 235.

The Circuit Court, after a consideration of the evidence, expressed its conclusion thus: —

"In any aspect of the case, it seems impossible to consider this complaint of the board of trade of Troy against the defendant railroad companies, particularly the Midland and Georgia Central Railroads, in the matter of the charges upon property transported on their roads to or from points east or west of Troy, as specified and complained of, obnoxious to the fourth or any other section of the Interstate Commerce Act. The conditions are not substantially the same, and the circumstances are dissimilar, so that the case is not within the statute. The case made here is not the case as it was made before the Commission. New testimony has been taken, and the conclusion reached is that the bill is not sustained; that it should be dismissed; and it is so ordered." 69 Fed. 227.

The Circuit Court of Appeals, in affirming the decree of the Circuit Court, used the following language: —

"Only two railroads, the Alabama Midland and the Georgia Central, reach Troy. Each of these roads has connection with other lines, parties hereto, reaching all the long-distance markets mentioned in these proceedings. The commission finds that no departure from the long and short haul rule of the fourth section of the

statute, as against Troy, as the shorter distance point, and in favor of Montgomery, as the longer distance point, appears to be chargeable to the Georgia Central. The rates in question, when separately considered, are not unreasonable or unjust. As a matter of business necessity, they are the same by each of the railroads that reach Troy. The Commission concludes that as related to the rates to Montgomery, Columbus, and Eufaula the rates to and from Troy unjustly discriminate against Troy, and, in the case of the Alabama Midland, violate the long and short haul rule.

"The population and volume of business at Montgomery are many times larger than at Troy. There are many more railway lines running to and through Montgomery, connecting with all the distant markets. The Alabama River, open all the year, is capable, if need be, of bearing to Mobile, on the sea, the burden of all the goods of every class that pass to or from Montgomery. The competition of the railway lines is not stifled, but is fully recognized, intelligently and honestly controlled and regulated, by the traffic association, in its schedule of rates. There is no suggestion in the evidence that the traffic managers who represent the carriers that are members of that association are incompetent, or under the bias of any personal preference for Montgomery or prejudice against Troy, that has led them, or is likely to lead them, to unjustly discriminate against Troy. When the rates to Montgomery were higher a few years ago than now, actual active water line competition by the river came in, and the rates were reduced to the level of the lowest practical paying water rates; and the volume of carriage by the river is now comparatively small, but the controlling power of that water line remains in full force, and must ever remain in force as long as the river remains navigable to its present capacity. And this water line affects, to a degree less or more, all the shipments to or from Montgomery from or to all the long-distance markets. It would not take cotton from Montgomery to the South Atlantic ports for export, but it would take the cotton to the points of its ultimate destination, if the railroad rates to foreign marts through the Atlantic ports were not kept down to or below the level of profitable carriage by water from Montgomery through the port of Mobile. The volume of trade to be competed for, the number of carriers actually competing for it, a constantly open river present to take a large part of it whenever the railroad rates rise up to the mark of profitable water carriage, seem to us, as they did to the Circuit Court, to constitute circumstances and conditions at Montgomery substantially dissimilar from those existing at Troy, and to relieve the carriers from the charges preferred against them by the Board of Trade. We do not discuss the third and fourth contention of the counsel for the appellant, further than to say that within the limits of the exercise of intelligent good faith in the conduct of their business, and subject to the two leading prohibitions that their charges shall not be unjust or

unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted, in other trades and pursuits. The carriers are better qualified to adjust such matters than any court or board of public administration, and, within the limitations suggested, it is safe and wise to leave to their traffic managers the adjusting of dissimilar circumstances and conditions to their business." 41 U. S. App. 453.

The last sentence in this extract is objected to by the commission's counsel, as declaring that the determination of the extent to which discrimination is justified by circumstances and conditions should be left to the carriers. If so read, we should not be ready to adopt or approve such a position. But we understand the statement, read in the connection in which it occurs, to mean only that, when once a substantial dissimilarity of circumstances and conditions has been made to appear, the carriers are, from the nature of the question, better fitted to adjust their rates to suit such dissimilarity of circumstances and conditions than courts or commissions; and when we consider the difficulty, the practical impossibility, of a court or a commission taking into view the various and continually changing facts that bear upon the question, and intelligently regulating rates and charges accordingly, the observation objected to is manifestly just. But it does not mean that the action of the carriers, in fixing and adjusting the rates, in such instances, is not subject to revision by the Commission and the courts, when it is charged that such action has resulted in rates unjust or unreasonable, or in unjust discriminations and preferences. And such charges were made in the present case, and were considered, in the first place by the commission, and afterwards by the Circuit Court and by the Circuit Court of Appeals.

The first contention we encounter upon this branch of the case is that the Circuit Court had no jurisdiction to review the judgment of the Commission upon this question of fact; that the court is only authorized to inquire whether or not the Commission has misconstrued the statute, and thereby exceeded its power; that there is no general jurisdiction to take evidence upon the merits of the original controversy; and, especially, that questions under the third section are questions of fact, and not of power, and hence unreviewable.

We think this contention is sufficiently answered by simply referring to those portions of the act which provide that, when the court

is invoked by the Commission to enforce its lawful orders or requirements, the court shall proceed, as a court of equity, to hear and determine the matter, and in such manner as to do justice in the premises.

In the case of Cincinnati, N. O. & Texas Pac. Railway *v.* Interstate Commerce Commission, 162 U. S. 184, the findings of the commission were overruled by the Circuit Court, after additional evidence taken in the court, and the decision of the Circuit Court was reviewed in the light of the evidence, and reversed, by the Circuit Court of Appeals; and this court, in reference to the argument that the commission had not given due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged, held that, as the question was one of fact, peculiarly within the province of the commission, and as its conclusions had been accepted and approved by the Circuit Court of Appeals, and as this court found nothing in the record that made it our duty to draw a different conclusion, the decree of the Circuit Court of Appeals should be affirmed. Such a holding clearly implies that there was power in the courts below to consider and apply the evidence, and in this court to review their decisions.

So in the case of Texas & Pacific Railway *v.* Interstate Commerce Commission, 162 U. S. 197, the decision of the Circuit Court of Appeals, which affirmed the validity of the order of the commission, upon the ground that, even if ocean competition should be regarded as creating a dissimilar condition, yet that in the case under consideration the disparity in rates was too great to be justified by that condition, was reversed by this court, not because the Circuit Court had no jurisdiction to consider the evidence, and thereupon to affirm the validity of the order of the commission, but because that issue was not actually before the court, and that no testimony had been adduced by either party on such an issue; and it was said that the language of the act, authorizing the court to hear and determine the matter as a case of equity, "necessarily implies that the court is not concluded by the findings or conclusions of the Commission."

Accordingly our conclusion is that it was competent, in the present case, for the Circuit Court, in dealing with the issues raised by the petition of the Commission and the answers thereto, and for the Circuit Court of Appeals on the appeal, to determine the case upon a consideration of the allegations of the parties, and of the evidence adduced in their support; giving effect, however, to the findings of fact in the report of the Commission, as *prima facie* evidence of the matters therein stated.

It has been uniformly held by the several Circuit Courts and the Circuit Courts of Appeal, in such cases, that they are not restricted to the evidence adduced before the commission, nor to a consideration merely of the power of the commission to make the particular order under question, but that additional evidence may be put in by

either party, and that the duty of the court is to decide, as a court of equity, upon the entire body of evidence.

Coming at last to the questions of fact in this case, we encounter a large amount of conflicting evidence. It seems undeniable, as the effect of the evidence on both sides, that an actual dissimilarity of circumstances and conditions exists between the cities concerned, both as respects the volume of their respective trade and the competition, affecting rates, occasioned by rival routes by land and water. Indeed, the Commission itself recognized such a state of facts, by making an allowance in the rates prescribed for dissimilarity resulting from competition; and it was contended on behalf of the Commission, both in the courts below and in this court, that the competition did not justify the discriminations against Troy to the extent shown, and that the allowance made therefor by the Commission was a due allowance.

The issue is thus restricted to the question of the preponderance of the evidence on the respective sides of the controversy. We have read the evidence disclosed by the record, and have endeavored to weigh it with the aid of able and elaborate discussions by the respective counsel.

No useful purpose would be served by an attempt to formally state and analyze the evidence, but the result is that we are not convinced that the courts below erred in their estimate of the evidence, and that we perceive no error in the principles of law on which they proceeded in the application of the evidence.

The decree of the Circuit Court of Appeals is accordingly

Affirmed.

Mr. Justice HARLAN, dissenting. — I dissent from the opinion and judgment in this case. Taken in connection with other decisions defining the powers of the Interstate Commerce Commission, the present decision, it seems to me, goes far to make that Commission a useless body, for all practical purposes, and to defeat many of the important objects designed to be accomplished by the various enactments of Congress relating to interstate commerce. The Commission was established to protect the public against the improper practices of transportation companies engaged in commerce among the several States. It has been left, it is true, with power to make reports and to issue protests. But it has been shorn, by judicial interpretation, of authority to do anything of an effective character. It is denied many of the powers which, in my judgment, were intended to be conferred upon it. Besides, the acts of Congress are now so construed as to place communities on the lines of interstate commerce at the mercy of competing railroad companies engaged in such commerce. The judgment in this case, if I do not misapprehend its scope and effect, proceeds upon the ground that railroad companies, when competitors for interstate business at certain points, may, in order to

secure traffic for and at those points, establish rates that will enable them to accomplish that result, although such rates may discriminate against intermediate points. Under such an interpretation of the statutes in question, they may well be regarded as recognizing the authority of competing railroad companies engaged in interstate commerce — when their interests will be subserved thereby — to build up favored centres of population at the expense of the business of the country at large. I cannot believe that Congress intended any such result, nor do I think that its enactments, properly interpreted, would lead to such a result.